

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 377/10
5296661

BETWEEN AMITPAL SINGH
Applicant

AND GILBARCO (NZ)
Respondent

Member of Authority: Vicki Campbell

Representatives: Christopher Eggleston for Applicant
Susan-Jane Davies for Respondent

Investigation Meeting: 5 May 2010

Submissions Received: 12 and 25 May 2010 from Applicant
21 May from Respondent

Determination: 23 August 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Amitpal Singh claims he was unjustifiably dismissed from his employment as a Service Technician with Gilbarco (NZ) Limited (“Gilbarco”) on 14 January 2010. Mr Singh made an urgent application to the Authority seeking interim reinstatement. However, as the Authority was able to offer the parties an early date it was agreed to proceed directly to an early substantive hearing in the first instance.

[2] Mr Singh commenced employment with Gilbarco on 18 September 2006, as a service technician and was subject to a written employment agreement. Mr Singh worked in a division of Gilbarco which handled the installation and service of weighing equipment, cash registers, ATMs, EFTPoS and other related equipment.

[3] On 2 October 2009, Mr Singh suffered from an accident at home. He fractured his little finger on his right hand. He contacted Mr Flavio Soratto, his manager and advised him that his hand was swollen and painful and that he would not be into work that morning as he was going to see his doctor.

[4] Mr Singh attended his doctor where he completed the requisite Injury Claim Form noting that the injury was not sustained in a work accident. Mr Singh had x-rays which confirmed that he had fractured his finger. He then attended Middlemore Hospital where the bones were to be straightened and a plaster cast was applied. The injury was then x-rayed again but he was told the fracture had not been aligned correctly and that he would need to attend the SuperClinic on 13 October to have his finger broken and reset.

[5] Mr Singh received a medical certificate putting him off work for 28 days. Mr Singh's injury was to be reviewed on 30 October 2009.

[6] On 9 October Mr Soratto contacted Mr Singh and enquired as to how he was getting on. Mr Singh says he told Mr Soratto that he had a further appointment with a plastic surgeon on 13 October to have the cast replaced. Mr Singh did not explain to Mr Soratto that he needed to have his finger rebroken and reset.

[7] On 13 October Mr Singh's finger was reset and a new plaster cast applied. Mr Singh's right hand was placed in a sling and he was told to avoid any activities that involved moving his right hand.

[8] On 14 October Mr Soratto contacted Mr Singh again and asked him to attend work on 16 October to see the Health and Safety Manager, Mr John Inkster. As he was unable to drive it was arranged that a work mate would pick him up and drive him into the work site. On 16 October, as agreed Mr John Flexer picked Mr Singh up, but rather than taking him to the work site, Mr Singh was taken to attend a doctor's appointment which had been made by Gilbarco. The doctor was not Mr Singh's doctor but one chosen by Gilbarco.

[9] Mr Singh was seen by Dr Kai Andreas. Dr Andreas was unable to examine Mr Singh's hand as it was in a plaster cast. Mr Singh gave Dr Andreas a copy of the first medical certificate which he had brought with him thinking he was attending with the Health and Safety Manager.

[10] Dr Andreas had a list of light duties which had previously been provided by Gilbarco and which he discussed with Mr Singh. Mr Singh felt that many of the jobs were unsuitable as they would require him to use both hands. Mr Singh advised Dr Andreas that he was happy to discuss things further with his manager but wanted to

wait until the cast was off and he had been re-examined by the doctors at the SuperClinic.

[11] Dr Andreas wrote to Gilbarco commenting that Mr Singh had arrived at the meeting angry as he had only been advised of the appointment 30 minutes earlier. Dr Andreas noted that Mr Singh was unaware of the company's return to work policy and felt most of the lighter duties on the list were inappropriate as they required the use of 2 hands.

[12] Dr Andreas reported that having explained the process and purpose of returning to work sooner he explained that tasks would be selected carefully and posed no safety concern. Transport would be provided. Dr Andreas was of the belief that Mr Singh was to discuss this with his manager but made it clear that Mr Singh preferred to return to work once his cast had been removed.

[13] On 27 October the plaster cast was removed and Mr Singh was advised his injury was progressing well. A smaller removable cast was provided and Mr Singh was reminded to avoid using his right hand whenever possible. Mr Singh was provided with a further medical certificate for 14 days.

[14] On 10 November Mr Singh was seen again at the SuperClinic and was told this time to avoid any heavy lifting with his right hand. On 12 November Mr Soratto made contact with Mr Singh and told him he was keen to have Mr Singh return to work as soon as possible. Mr Soratto offered to have Mr Singh picked up and driven to work if necessary. Mr Singh advised he was seeing his hand therapist the following day but that he would be able to return to work on Monday 16 November.

[15] Mr Singh was given clearance to return to work on 13 November and did so on 16 November. On arrival at work Mr Singh met with Mr Soratto where they discussed Mr Singh's injury. Mr Singh says that he worked that day but that at about 4.40pm he received a call from the dispatcher who advised Mr Singh that he should not be at work as he had not provided a "discharge certificate". Mr Singh says he was told he would not be paid for the hours worked that day.

[16] On 17 November Mr Singh contacted the SuperClinic and asked for a "discharge certificate". This was made available to him after 1.00pm the following day. On 19 November Mr Singh returned to work.

[17] On 20 November Mr Singh's ACC Case Manager contacted him and discussed his return to work. The Case Manager requested a copy of the certificate dated 18 November which was still at Mr Singh's home. Mr Singh requested a copy of the certificate from Gilbarco's Human Resources Manager, Ms Denise Illes. Ms Illes agreed to fax it to him the following morning when she returned to her office. Rather than wait for this to happen Mr Singh says he bought his copy of the certificate in and faxed that to ACC the next morning.

[18] On 26 November Mr Singh was working on a job which experienced a power outage meaning he could not continue to work on that job. He contacted Gilbarco seeking a new assignment to fill in the time but the new job required heavy lifting which Mr Singh says he was unable to do.

[19] Ms Illes contacted Mr Singh and advised him that his medical certificate did not mention that he was only able to do light duties and that he should do the job assigned to him or get a certificate which shows he can only undertake light duties.

[20] Mr Singh duly spoke to the SuperClinic, explained that the previous medical certificate dated 18 November did not mention light duties, that this was causing him problems at work and requested a new certificate. Mr Singh says he was contacted later that evening and was advised a new certificate was available for him to pick up. This certificate, dated 26 November confirms Mr Singh was not to undertake any heavy lifting with his right hand for a period of 28 days from 10 November. The 26 November certificate is signed by the same doctor who saw Mr Singh on 10 November.

[21] This certificate was provided to Mr Soratto the next day with a copy faxed to Ms Illes. This was Mr Singh's last day of work before he commenced a period of six weeks annual leave.

[22] Mr Singh returned from his leave on 6 January 2010. On 13 January he received a letter inviting him to attend a disciplinary meeting the next day regarding an allegation that he had refused to co-operate when Gilbarco attempted to provide him with light duties, that he had misled Gilbarco and provided false information with respect to his work status. Gilbarco also alleged Mr Singh had obtained a medical certificate detailing false information and knowingly submitted this to the company.

[23] Ms Illes ran the meeting and portrayed to Mr Singh that he had somehow persuaded the SuperClinic to issue him with false certificates and that Mr Singh had lied about being on light duties.

[24] Mr Singh was dismissed on 14 January 2010 for serious misconduct and for breach of trust and confidence. The company believed Mr Singh had misled it in respect to his recent injury and this led to loss of trust and confidence. Mr Singh claims his dismissal was unjustified.

Was the dismissal justified?

[25] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[26] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred³.

[27] The letter advising Mr Singh of the disciplinary meeting sets out the allegation of serious misconduct in the following terms:

That you refused to co-operate when the company attempted to provide you with light duties immediately following your accident and attempted to mislead the Company by providing false information and/or claims to various employees and outside professionals in respect of your work status. Of particular concern is that on at least one occasion, you sought and obtained a medical certificate detailing false information and knowingly submitted this to the company.

[28] Attached to that letter was a raft of documents which Mr Singh was expected to read through without any explanation as to why they were considered relevant.

[29] Following the disciplinary process Gilbarco summarily dismissed Mr Singh. The reasons for the dismissal, set out in a letter dated 21 January 2010, were:

...the decision to dismiss you for serious misconduct and for breach of trust and confidence...

Put simply, we were in a position whereby we were no longer able to believe the information we were receiving from you, your behaviour and attempts to mislead the

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

company in respect of the matter of your recent injury had resulted in a loss of trust and confidence in you as an employee.

[30] It seems to me that the primary issues as to whether the dismissal can be justified or not rest with findings with regard to the following:

- Did Mr Singh refuse to co-operate when Gilbarco attempted to provide him with light duties?
- Did Mr Singh attempt to mislead Gilbarco by providing false information and/or claims in respect of his work status?
- Did Mr Singh obtain a medical certificate detailing false information and knowingly submit it to the organisation?
- Was the conclusion that Gilbarco could no longer have trust and confidence in Mr Singh as an employee justified?

Refusal to co-operate with early return to work

[31] The employment agreement between the parties provides for paid sick leave and requires a medical certificate to support a claim for paid sick leave. The clause also allows the employer the discretion to require an “additional medical certificate” at the employers expense from its nominated doctor.

[32] Mr Singh was absent due to a non-work related injury. He was not in receipt of paid sick leave, even though the agreement allows for sick leave to be used for a non-work accident. The clause requiring a medical certificate did therefore not apply to him. The wording in clause 15.6 refers to an “additional certificate”. I have concluded this clause refers to the immediately preceding clause which requires a medical certificate to support claims for paid sick leave. I am satisfied that Mr Singh was under no obligation to attend the appointment with Dr Andreas, arranged as it was, pursuant to the employment agreement.

[33] Mr Singh maintains he did not receive advance notification of the Doctor’s appointment with Dr Andreas. Whether he did or not, I am satisfied he attended the meeting and did co-operate. This meeting took place while Mr Singh was justifiably absent and in receipt of ACC payments. The meeting took place three days after Mr Singh had had his finger broken and reset under a general anaesthetic. There is no acknowledgment of his recent surgery in the letter Dr Andreas sent to Gilbarco.

[34] Mr Singh discussed with Dr Andreas the list of light duties and explained which ones he could and could not do. This list was not provided to Mr Singh prior to the appointment with Dr Andreas, and therefore he had no opportunity to discuss it with his own doctor prior to the appointment.

[35] Mr Inkster told the Authority in his written evidence that when an employee is to have a long recovery period following an accident the usual practice is to seek clarification as to the actual diagnosis. In order to do that a signed consent from Mr Singh would be obtained to allow Gilbarco to discuss the diagnosis and any other issues relating to the injury with Mr Singh's doctor. Mr Inkster acknowledged at the investigation meeting that this practice was not followed in Mr Singh's case and he could provide no explanation for the failure.

[36] The evidence shows that on receipt of the medical certificate from Mr Singh, Mr Inkster concluded that the initial 28 days off work was excessive. He relayed his objections to the extent of the time off to Ms Denise Isles the Human Resources Manager and to Mr Sorrato.

[37] In reaching his conclusions however, Mr Inkster was not in receipt of the full facts. He did not know what the diagnosis was, and he was completely unaware that Mr Singh had undergone a general anaesthetic three days prior to his visit to Dr Andreas. Neither did Mr Inkster ask Dr Andreas to assess whether his view that the 28 days was excessive was correct or not. At the investigation meeting Mr Inkster agreed that given the information which he now had, 28 days was a reasonable recovery time.

[38] The employer's conclusion that Mr Singh was in some way not co-operating and that this warranted disciplinary action at the most severe level, can not be sustained. Gilbarco failed to acquaint itself with all of the facts when they were available to it. Further I am satisfied that through the investigation into Mr Singh's absence Ms Iles was influenced by Mr Inkster's initial email in which he states that the initial 28 days off was excessive.

[39] Ms Iles incorrectly viewed Dr Andrea's letter as asserting that Mr Singh did not co-operate during their appointment, however, the letter from Dr Andreas does not suggest that. While the letter sets out his observations of his appointment with Mr Singh he does not state that or indicate that Mr Singh was not co-operative.

Misleading the company

[40] Mr Singh has not provided Gilbarco with any misleading documents. All the documents provided to Gilbarco have been signed off by medical practitioners. While the process of obtaining the final medical certificate is dubious, the fault for that can not lie at Mr Singh's feet, but must be sheeted home to the medical practitioner signing it off. The medical certificate was signed off by the same doctor who saw Mr Singh on 10 November and who told Mr Singh not to do any heavy lifting.

[41] There is no basis on which Gilbarco could reasonably conclude that Mr Singh had attempted to mislead it.

[42] Ms Iles believed Mr Singh had provided false information to Gilbarco when he advised it that he was not to undertake any heavy lifting on 26 November 2009. Ms Iles conceded at the investigation meeting that she had not discussed with Mr Soratto what Mr Singh had told him when he returned to work. In his oral evidence at the investigation meeting Mr Soratto confirmed Mr Singh had advised him he could not do full duties.

[43] After hearing that evidence, Ms Iles acknowledged that had she been in possession of all of the facts during the disciplinary process it would likely have altered her view on this matter.

[44] The disciplinary investigation is for the employer to undertake. Fairness would require Ms Iles to have discussed with Mr Soratto what if anything Mr Singh had discussed with him on the day he returned to work.

[45] Further, Ms Iles concluded Mr Singh completed his normal duties including unpacking some heavy equipment, to support her contention that Mr Singh was able to undertake his full range of duties. However, at the investigation meeting it became clear that it was likely that Mr Singh's evidence that others had unpacked the heavy equipment was correct. Mr Soratto acknowledged that he had not seen Mr Singh unpack the equipment.

Did Mr Singh obtain a medical certificate detailing false information and knowingly submit it to the organisation

[46] I have already traversed this topic earlier in my determination. I have found that while the way in which Mr Singh obtained the final medical certificate with the annotation that he was not to undertake heavy lifting was dubious, Gilbarco have failed to establish this allegation as being proven.

Was the conclusion that Gilbarco could not longer have trust and confidence in Mr Singh as an employee justified?

[47] The investigation undertaken by Gilbarco was seriously lacking in many areas. Ms Iles failed to undertake full enquiries of Mr Soratto, Dr Andreas failed to make proper enquiries of Mr Singh's injury and diagnosis, Gilbarco read into Dr Andreas' report to the company issues which were not touched on in his report, and other assumptions were made without any supporting evidence.

[48] I find Gilbarco's conclusion that it could no longer have trust and confidence in Mr Singh to be unsafe.

Determination

[49] The decision by Gilbarco to summarily dismiss Mr Singh was not a decision an employer acting fairly and reasonably, would have made in all the circumstances. Mr Singh has been unjustifiably dismissed and is entitled to remedies.

Remedies

Reinstatement

[50] Mr Singh seeks reinstatement to his former position. Section 125 of the Act provides for reinstatement to be ordered, wherever practicable. Gilbarco opposes reinstatement.

[51] The Court of Appeal has confirmed that practicality involves the balancing of the interests of the parties and the justices of their cases. This is in regard to not just the past but also the future. To be practicable the action must also be capable of being carried out successfully.⁴

[52] Gilbarco says its relationship with Mr Singh has broken down and it has lost trust and confidence in Mr Singh. Gilbarco, relying on *Orme v Eagle Technology Group Ltd*⁵, says that the broken relationship and lack of trust and confidence is the complete answer and reinstatement should not be ordered. However, that judgment goes on to say that it is not enough to assert loss of trust and confidence. An employer must show the existence of good and proper reasons why loss of trust and confidence occurred.

⁴ *Lewis v Howick College Board of Trustees* [2010] NZCA 320; *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA).

⁵ 15/6/95, Goddard CJ, Wellington Employment Court, WEC 40/95.

[53] In this case, I find Gilbarco have failed to establish good and proper reasons why it says it has lost trust and confidence in Mr Singh. Further Gilbarco has not shown that there has been any conduct on the part of Mr Singh which is incompatible with reinstatement.⁶

[54] In light of all the relevant evidence I find that it is not impracticable for Mr Singh to be reinstated. Mr Singh is to be reinstated to his former position of service technician immediately. The terms and conditions of employment that applied at the time Mr Singh was dismissed will apply.

Lost wages

[55] Mr Singh claims average weekly earnings of \$1,080.50 and seeks payment for the full period up until his reinstatement. Gilbarco have calculated Mr Singh's average earnings as being \$980.57. Neither Mr Singh nor Gilbarco have indicated whether their calculations have taken into account the period of time Mr Singh was in receipt of ACC payments. I have preferred the calculation of Mr Singh to that of Gilbarco as being the more likely weekly average earnings.

[56] Mr Singh was required to mitigate his loss during his period of unemployment and while awaiting a determination of his claims. I am satisfied Mr Singh took some steps to meet this obligation, and also agree with the submissions on behalf of Gilbarco that he could have done more.

[57] In coming to my conclusions about the extent to which lost wages should be applied, I have taken into account the fact that had Gilbarco undertaken a complete and full investigation into its allegations it is more likely than not that Mr Singh would have remained in employment.

[58] It is appropriate to apply s 128(3) and order reimbursement for the whole of the wages Mr Singh has lost since his dismissal.

[59] Gilbarco is ordered to reimburse Mr Singh for all of the wages he has lost from the time of his dismissal down to the date of his reinstatement. The calculation of that sum is to be based on the average weekly earnings of \$1,080.50. I leave those calculations for the parties in the first instances. If they are unable to agree, leave is reserved for either party to apply to the Authority to determine the matter.

⁶ *Baumgardner v NIWAR Ltd* [1992] 3 ERNZ 800A.

Compensation

[60] The obligation to prove this aspect of Mr Singh's claim lies with him. Mr Singh has provided little evidence of the extent of his hurt and humiliation. Based on the evidence presented I am of the view that a only modest award should be made which I fix at \$4,000.

Contribution

Having found that Mr Singh has a valid personal grievance, I am required by s 124 of the Act to consider the extent, if any, to which he contributed to the situation giving rise to his personal grievance. I find he did not contribute to the situation in a manner requiring any reduction of remedies.

Summary of orders

- Pursuant to s 123(1)(a) of the Act, Gilbarco (NZ) is ordered to reinstate Mr Singh to his position of service technician. That reinstatement is to take effect immediately. Mr Singh is to be reinstated to the terms and conditions of employment that applied at the time of his dismissal.
- Pursuant to s 123(1)(b) of the Act, Gilbarco (NZ) is ordered to reimburse Mr Singh for the wages he has lost from the time of his dismissal down to the date of his reinstatement. The calculation of lost wages is to be based on a average weekly amount of \$1,080.50. If the parties are unable to agree on the amount, leave is reserved to apply to the Authority to decide that issue.
- Pursuant to s 123(1)(c)(i) of the Act, Gilbarco (NZ) is ordered to pay to Mr Singh \$4,000 as compensation for humiliation, loss of dignity and injury to his feelings arising out of his unjustified dismissal.

Costs

[61] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Singh may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority