

Pal Sharma, Clendon Store Manager, Mr Atapano Aiavao, Wiri Station Road Store Manager, Damandeep Singh Mavi, Clendon Frontline Person, and Ms Carolyn Cusin, National Human Resources Manager. Both parties have presented a considerable number of documents and CCTV footage has been viewed. All of the evidence has been closely considered, albeit not specifically referred to in this determination.

Background Facts and Evidence

[3] Mr Singh commenced his employment as a Frontline Retail Store Person on 21st August 2006 at the Clendon service station (“the store”). The terms and conditions of Mr Singh’s employment are provided within an individual employment agreement, signed by both parties on 21st August 2006.

[4] Mr Singh mostly worked the “graveyard” shift and along with other staff, had expressed some concerns about personal safety and security relating to some of the people that visit the service station late at night. It seems that these concerns largely arose from early September 2008, when PSL informed the Clendon employees of its proposal to remove the onsite security guard and replace that presence, by making an investment in improving the physical security measures within the store; and by providing additional security training. It appears that the reasoning of PSL was; that by introducing improved security measures within the store, all staff would obtain better safety and security; as the security guard only covered the graveyard shift. The evidence of Mr Callum Owen is that numerous new security measures were introduced at the Clendon site prior to the removal of the security guard. Mr Owen attested to the implementation of the new security programme being phased in from September 2008 through to February 2009, when the security guard was removed.

[5] On 13th November 2008, Mr Singh was rostered to work alone on the graveyard shift but he considered this to be such a dangerous situation, in regard to potential exposure to robbery and assault, that he did not work that shift. While the failure of Mr Singh to work on the shift that night was investigated as a disciplinary matter, Mr Singh was not subjected to any formal sanction.

The incident of 10 July 2009

[6] On 10th July 2009, Mr Singh and Mr Damandeep Singh Mavi were working the graveyard shift. At about 11:45 p.m, a male customer (“the man”) entered the store and proceeded toward the toilet. The evidence of Mr Singh is that he pointed to the “Out of Order” sign on the toilet door and told the man that the toilets were not working. Mr Singh says that the man ignored him and proceeded to the toilet. When the man came out of the toilet, he came over to the serving area and threw the screwed up “Out of Order” sign¹ at Mr Singh hitting him in the face. Mr Singh says that the man was “*verbally abusive.*” As I understand it, the man was admonishing Mr Singh because the toilets were not out of order, despite the sign. Mr Singh attests that he was “*extremely concerned*” for his safety. Mr Singh also says that he “*saw movement towards the main door*” and anticipated that the man’s companions, who were outside on the forecourt, would enter the store and escalate matters and “*do further harm*” to him. Mr Singh locked the main entrance door to prevent the other people coming in.² He also called the Police. The CCTV footage shows Mr Singh holding the telephone receiver out towards the man apparently indicating that he had called the Police. Mr Singh says that the man; “*became verbally abusive towards me.*”

[7] The man then proceeded towards the main entrance door to make his exit. Upon finding it that it had been locked by Mr Singh, the man attempted to open the door by using the touchpad beside the entrance, but because the touchpad was faulty, it would not open the door. The man then returned to Mr Singh, who remained located behind the serving counter, and asked him to open the door. The evidence of Mr Singh is that the man became “*very abusive.*” However, the CCTV footage does not reflect this. Rather, it shows that the man appears to be in reasonable humour and smiling, then with hands together, mock “begging” Mr Singh to open the door; but he refused. The man’s mood then changed to being aggressive and in a very athletic fashion, he vaulted through the security wires and over the counter with the apparent intent of assaulting Mr Singh.

[8] The evidence of Mr Singh is that the man punched him repeatedly. It is difficult to see from the CCTV footage what happened immediately after the man

¹ The sign was on A4 paper.

² The CCTV footage does not reflect any intention by the man’s companions to enter the store.

came through the security wires onto Mr Singh's side of the counter. But what is clear is that, both Mr Singh and the man came out from behind the serving counter and into the shop area. The evidence of Mr Mavi is that he saw Mr Singh:

"... running outside from the security door (in front of the pie warmer) and the drunk customer was running behind him. They were both outside the counter now, arguing and abusing each other."

[9] The further evidence of Mr Mavi is that the man tried to hit Mr Singh but Mr Mavi held the man's hands and tried to calm him down. Mr Mavi says that he tried to take the man towards the main door where his two woman companions were knocking on the door requesting that it be opened so they could take him out with them. Mr Mavi attests that at this point, Mr Singh went back behind the serving counter and Mr Mavi asked Mr Singh to open the door to let the man go outside, but Mr Singh didn't listen to him, as Mr Singh and the man were abusing and arguing with each other. Then the man freed himself from Mr Mavi's control and became aggressive again, ran towards Mr Singh at the serving counter, jumped back through the security wires onto Mr Singh's side of the counter, and both men then came back into the shop area again.

[10] The evidence of Mr Mavi is that the man again tried to hit Mr Singh but Mr Mavi held the man's hands. While Mr Singh and the man continued to abuse each other, the Police arrived. Mr Singh told Mr Mavi to open the door, albeit Mr Singh was apparently in a better position to do so, as Mr Mavi was holding onto the man to prevent him from hitting Mr Singh. However, upon Mr Singh asking Mr Mavi two or three more times to open the main door to let the Police in, Mr Mavi released the man and went to open the door. Upon being released, the man ran up to Mr Singh and hit him.

[11] Upon the main door being opened by Mr Mavi, the Police entered and placed the man in handcuffs. In the meantime, the Store Manger, Mr Surinder Sharma arrived, having been called by Mr Mavi. Mr Sharma took Mr Singh to the Police Station to make a statement, and then to a hospital for medical treatment for a cut on his cheek. At some point during the series of altercations, Mr Singh's glasses were broken. Mr Singh was offered EAP assistance by PSL but he declined this, but by agreement, he did take the next shift off. But Mr Singh failed to arrive for his shifts on 13th to 16th July without informing his manager.

Return to work

[12] Mr Singh returned to work on 17th July 2009 but refused to operate the cashier console or do cashier duties because he said he needed his glasses to work. The evidence of Mr Sharma is that Mr Singh would not get replacement glasses, even of a temporary nature, because he insisted that PSL should pay for new glasses. Eventually, the other cashier who works the graveyard shift, complained that as Mr Singh was not helping on the cashier console he couldn't keep up. Mr Sharma says that he had to arrange for another staff member to cover the shift, or he would have to stay back and assist. Mr Singh was subsequently moved to an afternoon shift but issues arose about this and he went back to the graveyard shift. In regard to the replacement of Mr Singh's glasses, Mr Sharma says that he asked Mr Singh to provide him with the invoice for existing glasses, presumably to ascertain what the cost of replacement might be. Mr Singh said that he bought the glasses in India but would obtain the invoice from there, if PSL paid him.

The investigation into the incident

[13] The evidence of Mr Atapana Aiavao, Store Manager – Wiri Station Road, is that he was instructed by the Territory Manager to investigate the incident. On 22nd July 2009, Mr Sharma wrote to Mr Singh inviting him to a disciplinary meeting regarding the incident of 10th July 2009. Among other things, the letter informs:

We are concerned about the incident that occurred on 10/07/2009 around 10.55pm. During this incident we believe you have breached Second Schedule House Rules as per your contract.

1.3(c) *being careless in undertaking your duties to an extent that the carelessness is likely to cause injury to yourself, to other employees or member [sic] of the public.*

1.4(r) *breaching health and safety procedure.*

We also believe that as per your Retail Security Folder, you have not followed the company procedures regarding "Threatening Situations-Aggressive customers in the shop.

PSL considers this to be serious and we would like to hold a disciplinary meeting with you to seek your explanation and comment on our concerns. You need to be aware that due to the seriousness of this concern an outcome of the meeting could be a written warning or instant dismissal if considered serious misconduct.

[14] It appears that Mr Singh did not respond to this letter and hence another was sent to him on 24th July 2009, proposing a meeting date of 31st July. This meeting did not eventuate. In an email to Mr Sharma dated 9th August 2009, Mr Singh conveyed that he couldn't attend the disciplinary meeting: "... *without reading and*

*understanding the contents of the letter and for that I need my glasses. Please approve my glasses invoice at an early date to enable me to come for [sic] meeting.”*³

The disciplinary meeting was subsequently proposed to take place on 21st August 2009 but Mr Singh failed to attend.

[15] On 24th August 2009, Ms Carolyn Cusin, Human Resources Manager, wrote to Mr Singh in response to the matters he had raised in his email of 9th August 2009. In regard to Mr Singh’s glasses, Ms Cusin informs that while Mr Singh had been requested to bring his damaged glasses into his manager, along with the purchase invoice and a prescription, for PSL to obtain some “*additional quotes*,” he had not done so and had advised that he had thrown away the glasses, and had confirmed that the glasses had not been purchased in New Zealand. Ms Cusin informed that:

The Company’s position is that should the disciplinary process conclude that your actions were appropriate on the night of 10 July and did not breach PSL’s policies and procedures, and that the damage caused to your glasses was as a result of your duties as an employee, then PSL is prepared to reimburse you for the reasonable cost of replacing your glasses upon evidence of the purchase price of your damaged pair of glasses.⁴

[16] Ms Cusin concluded her letter by informing Mr Singh that the disciplinary meeting would now take place on 28th August 2009 and that if he failed to attend, PSL: “... *will be forced to make a decision on the basis of the information we have available at the time.*”

[17] Nonetheless, for various reasons, the disciplinary meeting did not take place until 8th September, followed by further meetings on 17th September, 30th September and 1st October 2009. The final outcome was confirmed in a letter from Mr Sharma dated 7th October:

The nature of the serious misconduct was that in an incident on 10th July you deliberately failed to follow Health and Safety procedures relating to Company Security procedures.

This is considered to be very serious by the Company because you put yourself and your fellow employee at risk of physical harm and the Company at risk of damage to

³ Rather oddly, as there is no mention of a human rights complaint from Mr Singh, it appears that he copied this email to the Human Rights Commission: “... *under their reference # 372492 with a humble request to intervene as it is a matter of Health and Safety as my management is forcing me to work without my spectacles, which is [sic] unjustified and inhuman act.*”

⁴ It subsequently transpired that PSL declined to replace Mr Singh’s glasses. The evidence of Mr Callum Owen, Performance Support Manager, is that following an investigation, PSL concluded that Mr Singh’s behaviour was a causal factor that led to his glasses being broken and PSL was not prepared to reimburse him for something that should have been prevented.

its premises. In fact you were assaulted in the incident and suffered personal injury and damage to your glasses.

We met with you to discuss these matters on 8th, 17th, 30th September and 1st October, and you were given the opportunity to have a representative. After seeking your explanation and taking time to consider what was said, you acknowledged the correct Company procedure but chose not to follow the procedure which undermines the Company's trust and confidence in you. It was confirmed with you that your employment would be terminated effective immediately.

Analysis and Conclusions

Was the dismissal of Mr Singh unjustified?

[18] Section 103A of the Employment Relations Act 2000 provides the test to be applied. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, 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 or action occurred.

[19] The position of PSL is that the dismissal of Mr Singh was justified and it was for serious misconduct, the nature of it being that in regard to the incident on 10th July 2009, he; "*deliberately failed to follow Health and Safety procedures relating to Company Security procedures.*" This was considered to be very serious by the Company, because Mr Singh put himself and Mr Mavi, at risk of physical harm, and the Company at risk of damage to its premises.

[20] An objective analysis requires an examination of the relevant health and safety and security procedures. These are apparently, contained in the PSL Human Resources Manual⁵ and then collated into the *Retail Security Folder* which was presented to the Clendon site staff in January or February 2009⁶ when there was a security training programme "rolled out." This involved an on-site training session run by four PSL personnel including the Company's Retail Safety Specialist, Ms Cochrane, Mr Charles Ewart, Mr Owen, and the Territory Manager, Mr Ian Sansum. Mr Owen attests that:

⁵ The Authority has not sighted the Human Resources Manual but relevant material in regard to the *Retail Security Folder* has been produced.

⁶ Mr Owens says that it was 9th January but other evidence suggests it may have been February. I note that the *Retail Security Folder Training Record Book* for Mr Singh was signed off by Mr Sharma on 27th February 2009.

The key messages / learning points that staff were to take away with them at the end of the training were how staff could lower the security risk at their store through the use of new equipment, by following security policy and procedures and adopting safe behaviours when working.

There is conflict in the evidence as to how long the training session went for. Mr Singh says that there was inadequate security training in regard to the *Retail Security Folder* and only 20 minutes was dedicated to it out of a 1.5 hour session. Mr Owen says that training session went “*for at least two hours*” with a question and answer session following. On the basis of the overall evidence, I conclude that Mr Owen’s version of events is more probable.

[21] The *Retail Security Folder* contains a specific provision pertaining to “*Threatening Situations*” relevant to the circumstances relating to Mr Singh. The Threatening Situations procedure is also to be found in the *Emergency Response Flipchart* which is kept in a prominent position in the Clendon store. It contains specific advice about “*Aggressive customers in the shop*” including:

- Keep calm and do not raise your voice. Speak at an even pace
- Stay on your side of the counter
- Try and identify the exact nature of the complaint
- If the situation escalates, back off
- Encourage trouble makers to leave the shop
- Do not lock aggressive customers in the shop
- If you feel threatened, use panic alarm to call for security

[22] The matter of aggressive customers is the subject matter of the Company’s *Nobody gets hurt* security bulletin issued to staff in June 2009. There is a specific reference to always following “*security policies, procedures and guidelines.*” The Aggressive customers in shop policy (above) is set out in full and it has; “***Do not lock aggressive customers in the shop***” emphasised. It appears that the content of the June bulletin was discussed at the June monthly safety training at the Clendon site. Mr Singh was in attendance, as evidenced by his signature on the attendance register. On the overall evidence, I conclude that Mr Singh was quite aware of the Company’s security policies, procedures and guidelines, in particular, the “aggressive customers in the shop” procedure.

[23] It is clear that Mr Singh failed to observe even a modicum of the requirements of the “aggressive customers in the shop” procedure, all of which is set out in basic terms that require a very simple and common sense application. Quite simply, all Mr Singh had to do to avoid the physical confrontation that erupted, was to unlock the main door and let the man go as he was requesting, while he was initially in good humour, as shown by the CCTV footage. Furthermore, I do not accept Mr Singh’s explanation that the man’s companions were likely to escalate matters if he had left the main door unlocked and hence allowed them in. The CCTV footage at the time that Mr Singh locked the door, reveals no concern being expressed by them. Indeed, even after Mr Singh locked the door, there was no reaction by the man’s companions, except to encourage him to leave the store and join them outside.

[24] While it is not possible to excuse or mitigate the unacceptable and aggressive behaviour of the man when he went on to insult and assault Mr Singh, it is clear that Mr Singh could have and should have, prevented this. From the CCTV footage, it seems probable that Mr Singh actually provoked the man who was apparently, in a drunken or near drunken condition. Even when Mr Mavi intervened twice and had things more or less under control, Mr Singh continued to actively aggravate the situation with the result that the man again chased Mr Singh and caught up with him in the store, where the damage to Mr Singh’s face and glasses appears to have occurred. Additionally, there was available to Mr Singh access, to a “safe room” immediately off the customer serving area, that simply required inputting a five digit code to enter. Perhaps Mr Singh may have been caught off guard the first time the man came at him through the security wires, and hence he quickly vacated the serving area for the expanse of the store, but he must have had time during the second round to secure himself in the safe area and hence prevent a further assault being inflicted. Then inexplicably, when Mr Mavi intervened again and restrained the man, Mr Singh still refused to unlock the main door, even when the Police were present.

[25] I find that following a properly conducted investigation, PSL were fairly and reasonably entitled to conclude that Mr Singh deliberately (or otherwise) failed to follow the Company’s safety and security policies. I also conclude that Mr Singh was familiar with the requirements of those policies, but for his own reasons, most probably related to his dissatisfaction about the removal of the security guard by PSL,

he chose to ignore them, with the result that he put himself and Mr Mavi⁷ at serious risk of physical harm and exposed the premises and stock of PSL to potential damage. I also conclude that PSL were entitled to treat the behaviour of Mr Singh as serious misconduct and the sanction of dismissal was an option that was fairly and reasonably available.

Is there anything that makes the dismissal of Mr Singh unfair and/or unreasonable?

A safe workplace?

[26] Mr Singh says that he was unjustifiably dismissed as a direct result of a failure by PSL to provide him with a safe workplace and that a fair and reasonable employer would not have dismissed him in the circumstances. In particular, Mr Singh says that the situation that he found himself in would not have arisen, if the security guard had been retained. That may well be so, but it does not follow that PSL did not provide Mr Singh with a safe workplace. I am satisfied that before PSL removed the security guard, appropriate modifications and additions were made, in consultation with staff, along with associated training being provided, to ensure that all employees had a safe work environment. And in the event that a confrontation arose, there were appropriate procedures to follow to prevent, or at least reduce, any harm being visited upon an employee in the circumstances that applied to Mr Singh. I accept the evidence of Mr Owen and Mr Mavi in regard to this. In summary, I do not accept that there was a failure by PSL to provide Mr Singh with a safe workplace.

[27] Mr Singh also says that because the main door release mechanism (as available to customers) wasn't working, this led to the situation where the man escalated events which was a factor beyond his control. It is true that if the door release mechanism had been working, the man could have made an exit, hence the confrontation would probably have been avoided. But Mr Singh had full control over the door lock before matters escalated as they did, and again subsequently. Quite simply, all he had to do was unlock the door when the man reasonably requested such and that would have been the end of the matter. While it was less than ideal that the

⁷ The credible evidence of Mr Mavi is that after the incident, Mr Singh told him that he (Mr Singh) wanted the Police to "nab" the drunk man. Mr Mavi attests that Mr Singh told him that if the door had been unlocked, the man would have gone and the Police would not be able to catch him.

customer door release was not working, that does not assist Mr Singh in regard to mitigating his behaviour.

Bias and predetermination?

[28] Mr Singh says that the disciplinary investigation conducted by PSL was marred by bias and predetermination. There is the evidence of Ms Tata who attended and represented Mr Singh at the four disciplinary meetings. Ms Tata attests that it was clear to her "... *from the outset that [PSL] had already predetermined the outcome of the process due to the fact that they were unwilling to reasonably listen to anything that Mr Singh had to say in regards [sic] to his justifications [sic] for his actions in question.*" On the other hand there is the evidence of Mr Aiavao, who conducted the investigation. He says that while Mr Singh said that he genuinely thought he was doing the right thing, there were a number of factors that pointed against Mr Singh's position, including that the CCTV footage did not bear out what Mr Singh was saying. While there is some evidence that shows that Mr Singh is a headstrong and difficult person to deal with at times, I do not accept that there is any tangible evidence of bias or predetermination in regard to the investigation conducted by PSL. On the contrary, I conclude that PSL were quite accommodating of the overall behaviour of Mr Singh during the investigation process.

Disparity?

[29] There was a prior incident on 13th April 2009. Mr Singh, Mr Sharma and Mr Gurdial Singh were on duty at the Clendon store when two male customers entered and became abusive because they couldn't withdraw cash above the limit that PSL policy allows. The *Near Loss and Loss Investigation* report (13.04.09) compiled by Mr Singh and Mr Gurdial Singh, informs that the two customers became abusive and threatening towards them and also towards Mr Sharma. The Police were called and subsequently took away the two customers. Among the rest of the details, the report informs that:

"Finally, police was [sic] called after main door locking."

The evidence of Mr Singh is that:

"The abusive behaviour of the customers prompted Gurdial to lock the main door. Store Manager, Surinder Sharma called for police assistance and kept the abusive customers locked in the store until the police arrived."

Mr Singh says that there was no disciplinary action taken against Mr Gurdial Singh for locking the main door in breach of the Company's policy. The evidence of Mr Sharma is that Mr Tarsem Singh called the Police and then Mr Sharma spoke to them on the phone. Mr Sharma says that during his conversation with the Police he checked the door locking switch at the console and "... *it was not locked.*" Mr Sharma attests that following this incident, Mr Gurdial Singh and other staff asked if they could lock the doors and he explained to the staff that they can't lock the doors; and that if there is an abusive customer, they should be calm, get rid of the customer, and then lock the door.

[30] The content of the *Near Loss and Loss Investigation* report which was compiled on the night of the incident of 13th April 2009, tends to collaborate Mr Singh's evidence rather than that of Mr Sharma and I am inclined to the conclusion that it is probable that Mr Gurdial Singh did lock the customers in on the night in question. Indeed, one could reasonably conclude that upon the arrival of the Police, the two customers involved would have exited quickly out the door if it had remained unlocked. Furthermore, Mr Sharma's evidence is not consistent with the content of the *Statement in Reply* (para 2.22). But it does not follow that there is an issue of disparity to the extent that Mr Singh's behaviour on the night of 10th July 2009, can be mitigated by what Mr Gurdial Singh did on the night of 13th April, as the circumstances are not comparable. In regard to the incident on 10th July, Mr Singh could have and should have, let the man involved leave when he initially requested as there was no reason to keep him there. At that stage of events, the man had not made threats to the personal safety of Mr Singh, or his family, as apparently occurred on 13 April. Also, there is nothing to suggest that the incident on 13th April was aggravated by the actions or behaviour of any of the three staff on duty that night. Furthermore, it seems to me that allowing an earlier safety infringement to go unheeded could not justify a later infringement. This proposition is supported by the findings of the Court of Appeal in *Samu v Air New Zealand Limited* [1995] 1 ERNZ 636 at 639:

All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

Finally, even if I am mistaken on the issue of disparity (and I think not), the matter of how to deal with aggressive customers was dealt with again by PSL in the June 2009

Nobody gets hurt security bulletin, and at the June monthly safety training, hence by then, Mr Singh was well aware of the Company's policy.

Determination

[31] For the reasons set out above:

- (a) I find that Mr Singh was not unjustifiably dismissed;
- (b) Pegasus Stations Limited did not fail to take all practicable steps to safeguard Mr Singh from an assault; and
- (c) Mr Singh does not have a personal grievance and his claims are dismissed.

Costs

[32] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority