

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 598  
3037933

BETWEEN                      PETER ROBERT GRIERSON  
Applicant

AND                              METALLIC SWEEPING (1998)  
LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Peter Cranney and Gayaal Iddamalgoda, counsel for the  
Applicant  
Tim McGinn, counsel the Respondent

Investigation Meeting:      10 and 11 July 2019 at Blenheim

Submissions and Further     11 July 2019 from the Applicant and Respondent  
Information Received:        Further information provided by applicant on 17 July 2019  
29 July 2019 from the Respondent

Date of Determination:      18 October 2019

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**DETERMINATION OF THE AUTHORITY**

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**A     Peter Grierson was unjustifiably dismissed from his employment with  
Metallic Sweeping (1998) Limited.**

- B Taking contribution into account Metallic Sweeping (1998) Limited is ordered to pay:**
- (i) The sum of \$1973.00 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.**
  - (ii) The sum of \$19,800 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C Costs are reserved and failing agreement a timetable is set for an exchange of submissions.**

### **Amendment to Statement in Reply**

[1] Mr McGinn applied for leave on the morning of the investigation meeting to amend the respondent's statement in reply on the basis advised to the Authority, Mr Cranney and Mr Iddamalghoda on 5 July 2019. Leave was not opposed and was granted.

### **Employment Relationship Problem**

[2] Peter Grierson was employed by Metallic Sweeping (1998) Limited (Metallic Sweeping) from 20 March 2017 as an assistant manager at its Marlborough site.

[3] Metallic Sweeping provides services to the Marlborough District Council pursuant to the terms of a commercial contract for the provision of waste management and minimisation services and the operation of the transfer stations and resource recovery in the Marlborough resource recovery centre which includes the re-use store.

[4] The managing director of Metallic Sweeping is Clive Peter. The contract manager for Metallic Sweeping in Blenheim is Trevor Sheldon.

[5] Mr Grierson says that his summary dismissal on 14 June 2018 from Metallic Sweeping was unjustified both procedurally and substantively. He seeks compensation,

reimbursement of lost wages and costs. He no longer seeks the remedy claimed of reinstatement in the statement of problem.

[6] Metallic Sweeping does not accept that the dismissal was unjustified and says that Mr Grierson was dismissed for serious misconduct. Further that there are two instances of after discovered misconduct on the part of Mr Grierson. Metallic Sweeping says that in the event the dismissal is found to be unjustified then any remedies must take those matters into account.

### **The Issues**

[7] The Authority needs to consider the following issues in this matter:

- (a) What does the test of justification require the Authority to consider where there is a claim of unjustified dismissal?
- (b) What are the material provisions in the employment agreement?
- (c) What concerns did Mr Grierson raise with Metallic Sweeping before the disciplinary process commenced?
- (d) What were the reasons for dismissal?
- (e) Could a fair and reasonable employer have concluded that there was substantive justification for the dismissal?
- (f) Was there a full and fair investigation?
- (g) Could a fair and reasonable employer have reached the decision to dismiss?
- (h) If the dismissal was unjustified then what remedies should be awarded, are there issues of contribution and mitigation and after discovered misconduct?

### **The test of justification**

[8] The Authority is asked to consider whether Mr Grierson was justifiably dismissed. In doing so it is required to apply the justification test in s 103A of the Employment Relations

Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Metallic Sweeping, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[9] The Authority must assess under this test whether there was substantive justification for dismissal. That means that it must consider whether any conduct could be concluded fairly and reasonably to be misconduct of a sufficiently serious nature that could justify summary dismissal.

[10] Procedural fairness factors are set out in s 103A(3) of the Act. These are whether the allegations against Mr Grierson were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether such response was considered genuinely by Metallic Sweeping before dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[11] Metallic Sweeping could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

### **What are material provisions of the Employment Agreement?**

[12] Mr Grierson was party to a written individual employment agreement (the agreement) with Metallic Sweeping that he signed on 16 March 2017. I set out below the material parts for the purpose of this determination.

[13] There is an entire agreement clause at 1.2 that provides as follows:

This agreement supersedes any previous contract, agreement, arrangement or individual conditions of employment and no such matters will be recognised as a term of this agreement unless they have been agreed subsequent to the signing of this agreement and recorded in writing and signed by both parties.

[14] Clause 2 of the agreement is headed “position and duties”. Mr Grierson’s position is recorded as assistant manager and that his primary duties are said to be contained in schedule A to the agreement. That provides as follows:

All duties as may be required, delegated to and/or called upon to perform so as to ensure the satisfactory performance of the employer in terms of its contracts with the Marlborough District Council and as requested by the Manager and/or the Managing Director.

[15] Under clause 2 of the agreement Mr Grierson agreed to comply with house rules as notified by the employer with reasonable notice being given to the employee of any change to those rules. He agreed that in carrying out his duties he would represent Metallic Sweeping faithfully and at all times promote its interests. Further, that he would carry out all reasonable policies, rules, instructions and directions given to the best of his ability and lead and motivate any subordinates by example. Clause 2.5 provides that Mr Grierson will exhibit a high standard of professional behaviour at all times.

[16] Clause 3 of the agreement provided Mr Grierson's salary was \$55,000 per annum to be paid on a fortnightly basis. The clause also provided he would be paid a monthly bonus of \$500 based on certain agreed key performance indicators being met and would be provided with a company vehicle.

[17] Clause 3.2 provided his salary would be reviewed initially after three months and then annually and that his performance would also be reviewed at least once every year.

[18] Clause 4 is about hours of work. It provided:

4.1 The ordinary hours of work shall be based on a minimum of 40 hours [per] week however the employee acknowledges that he may be required to work additional hours as appropriate to meet the needs of the business. The salary specified in this agreement is deemed to cover payment for overall performance of the job and overtime will not be payable.

4.2 Due to the nature of the employer's business the Employee agrees to be available for work day and night, weekends and public holidays, and on call 24 hours as required to meet the needs of the job.

[19] Clause 10 of the agreement is about conflict of interest. and that provides as follows:

The Employee will not enter into any other employment agreement or relationship or activity which could bring the Employee into conflict with his obligations under this agreement or adversely affect the Employee's duty of fidelity to the Employer. Any breach of this clause will be treated as serious misconduct and may result in summary termination without notice.

[20] Attached to the employment agreement is a clause about help to solve any employment relationship problem and what an employment relationship problem can include.

It is noted in step one on page eight of the agreement that a problem should be referred by the employee to the appropriate supervisor or manager representing the employer in the first instance as soon as possible so that it can be addressed speedily and effectively without undue delay.

**What concerns did Mr Grierson raise with Metallic Sweeping before the disciplinary process commenced?**

[21] Mr Grierson raised concerns during his employment with Metallic Sweeping about his terms and conditions of employment. I understand these may be pursued at a later time to the extent they remain unresolved. The concerns are set out in this determination to provide context to the employment relationship, the allegations of misconduct and alleged after discovered serious misconduct.

*KiwiSaver*

[22] Mr Grierson communicated in or about October 2017 by email with Mr Peter's personal assistant about concerns KiwiSaver contribution/deductions were not being made. He was advised that Mr Peter viewed KiwiSaver as part of Mr Grierson's salary package and that Mr Grierson would need to discuss that with him directly.

[23] On 22 November 2017 Mr Grierson discussed KiwiSaver at a face to face meeting with Mr Peter. Mr Peter advised Mr Grierson to the effect that he viewed the employer contribution as part of "your overall cost to my business." In other words as part of his salary package. Mr Grierson suggested to Mr Peter that may not accord with the law. Nothing further happened until in or about March 2018 Mr Grierson took a more formal approach about his concerns with his employment and obtained representation from Ms Kim James at Three60 Consult Ltd. Under cover of a summarised version of concerns from Ms James dated 23 March 2018 Mr Grierson sent a letter to Metallic Sweeping dated 20 March 2018 that canvassed in some detail his concerns about his terms and conditions of employment.

[24] Mr McGinn became involved on behalf of Metallic Sweeping and responded initially with a letter dated 3 April 2018. He advised without embellishment that the KiwiSaver matter had been resolved with backdating. In a second letter dated 25 May 2018 he confirmed that

KiwiSaver had been backdated to 27 October 2017 being the date of the opt-in form. Mr Grierson had asked for backdating of KiwiSaver to his start date in March 2018.

### *Work Hours*

[25] One of the most significant concerns for Mr Grierson was that he regarded his working hours as excessive. Mr Grierson set out in his 20 March 2018 letter to Metallic Sweeping the hours he was actually working. They were 10 ¼ to 10 ½ hours per day Monday to Friday and 7 ¼ to 7½ hours on a Sunday. Mr Grierson extrapolated out that over 60 hours his hourly rate on his salary of \$55,000 reduced to \$17.63. He provided in the letter a record of the hours that he had worked every week for a period of 51 weeks and 6 days from his start date on 20 March 2017 to 18 March 2018. That record shows that he worked in excess of 60 hours per week for 10 of those weeks and for one of the weeks he worked 67.25 hours. Averaged out he worked 52.85 hours each week.

[26] Mr Peter is correct in his evidence that Mr Grierson did not complain initially to him about his work hours. When Mr Grierson commenced work his family was still in Auckland and did not come to Blenheim until October 2017. He was also very grateful he stated in his evidence to have a job. During his initial time at Metallic Sweeping he worked 20 days in a row with no day off from 20 March – 8 April 2017. This period included work over two weekends. He worked a number of other periods over a weekend. For one period 4 May – 23 May 2017 he worked three weekends. In agreement with Mr Sheldon he could have an occasional day off and from in or about May started having most Wednesdays off. At a later point Mr Sheldon advised Mr Grierson that he would like him to take Saturdays off and that he would take Sundays off. For the duration of his employment Mr Grierson was required to work six days every week and on occasions for extended days with no time off even on the agreed day.

[27] Mr Grierson initially raised concerns about the hours he was working with Mr Peter by phone in January 2018 and shortly after that at a face to face meeting with him in January when Mr Peter came to Blenheim. On the telephone call Mr Grierson referred to working in excess of 50 when the minimum hours in the employment agreement were 40 hours per week. Mr Peter responded that before Mr Grierson took the role he knew it was a 7 day operation and that it required working weekends. Mr Grierson said that Mr Peter became “extremely aggressive” about his complaint and suggested that “it may not be the right job for

Mr Grierson". Mr Peter did not accept that he was aggressive. He said he may have said that it may not be the right job for Mr Grierson.

[28] Mr Grierson advised Mr Peter amongst other matters that his working hours were impacting on his marriage. Mr Peter said in his evidence that he responded he was sorry but that Mr Grierson knew what the role involved. He was not prepared at that time to agree to a request for Mr Grierson to have one Sunday off in three (a full weekend) rather he wanted to discuss it at a later time with a salary review. Mr Grierson felt that was too long a time for the matter to be resolved. Mr Peter did permit Mr Grierson to have one weekend off at that time because he had been working the previous 13 days with no break.

[29] When matters were more formally set out in the 20 March letter Mr Grierson referred to availability provisions in the Act. He stated he wanted to be paid at the pro-rated hourly rate of \$26.44 for every hour in excess of 44 hours per week which was the 40 hours in the agreement plus an additional 10%. His view as expressed in the letter was that without an availability provision clause he could refuse to be available for any extra work. He also wrote he wanted one Sunday off in three from 23 March 2018 and an agreement to be reached on how many hours could be reasonably required of him each week. He also set out that he would not be recording, as he said that he was instructed to do by Mr Sheldon, that he took a lunch break when he was in fact not able to.

[30] Mr McGinn responded about hours worked in the 3 April letter. He referred to the submitted schedule of hours but noted that Mr Grierson had a vehicle with a notional value estimated of \$15,000. He also referred to the monthly performance bonus of \$500 although wrote that Mr Grierson had failed to sign off the KPIs to be eligible for the same. On that basis he set out that remuneration extrapolates to \$25.67 per hour.

[31] He stated that Metallic Sweeping believes the employment agreement and pre-contractual negotiations met the requirement of an availability provision which "more than compensated" Mr Grierson for his average week of 52.85 per hour. Further that Mr Grierson had agreed to these "terms of employment with his eyes wide open, fully appreciating the hours commitment that would be required and has raised his concerns recorded in his letter for the first time more than 12 months after signing the agreement."

[32] Mr McGinn wrote that Metallic Sweeping had indicated an intention to review Mr Grierson's remuneration at the completion of his 12 months service. He wrote that it was difficult to see how a review will work with Mr Grierson threatening to withdraw his services that he had agreed to in the employment agreement. He noted if Mr Grierson wished to maintain that position then the likely outcome would be that his client would take disciplinary action and the issue of availability provisions "will come under scrutiny." Mr McGinn wrote that the best solution may be to obtain a ruling from the Authority.

#### *Deductions/sick leave*

[33] Mr Grierson also raised concerns about deductions from his pay when he was absent notwithstanding he had completed a 40 hour week and payment of sick leave at a lower rate than an average work day. Mr McGinn answered these matters in his 3 April 2018 letter. He did not accept errors on the part of Metallic Sweeping about how those matters had been dealt with.

[34] In his second letter of 25 May 2018 Mr McGinn referred in more detail about two pay periods and stated a correction had been made for one error in one of those pay periods. Mr Grierson was concerned however about other pay errors that he says were not addressed.

#### *Bonus payment*

[35] Mr Grierson did not receive bonus payments in accordance with his employment agreement. He said that he had raised the issue earlier in his employment and Mr Peter said he would look into it. Mr Peter and Mr Sheldon discussed with Mr Grierson at a meeting in Blenheim some criteria for a bonus on 22 November 2017. What was said at that meeting is in dispute. Mr Peter said that he had left proposals with Mr Grierson to consider and come back to him about but he failed to do so and then he needed to follow him up for feedback. Mr Grierson understood that Mr Peter would provide the criteria to him for consideration.

[36] I find that the email Mr Peter sent on 23 February 2018 attaching the criteria for the bonus payment is more consistent with Mr Grierson's recollection that Mr Peter would provide him with criteria for consideration and that there was some delay in doing so. The email from Mr Peter does not suggest earlier delay in Mr Grierson getting back to him. Mr Grierson responded to the suggested KPI's attached to the 23 February email with some

questions and concerns in early March. The KPI's were never finalised. Mr Peter says that matters were then overtaken by the letter of 20 March raising concerns. In his letter of 3 April 2018 responding to the concerns amongst other matter Mr McGinn stated that Mr Grierson had failed to sign off the KPI's required to be eligible for such a bonus.

### **What happened next?**

*First Union advises that it is now acting for Mr Grierson*

[37] On 17 May 2018 union organiser Rachel Boyack wrote to Mr McGinn advising that First Union (the union) was acting for Mr Grierson and seeking a response to a second letter from Ms James dated 20 April 2018 in response to Mr McGinn's letter.

*Stopping access for emails and company information to Mr Grierson's laptop and phone*

[38] On 18 May 2018 Mr Peter sent Mr Grierson a memo about the use of the laptop when working at home. He said that in an effort to assist Mr Grierson "in not working at home" he was arranging with immediate effect to stop all email and company information being accessed via Mr Grierson's laptop and phone. Mr Grierson was asked to delete and erase all information and emails "related to the company in any way" to ensure confidentiality and integrity and confirm in writing that had been done.

*Mr Grierson responds to the memo*

[39] On 22 May 2018 Mr Grierson responded to Mr Peter by email expressing some surprise at his memo. He noted that he only worked at home on very rare occasions and used his laptop because there were only 2 computers in the office used by 4 staff. He stated that he had complied with the request. He asked Mr Peter what had led to the change and whether other staff had also been issued similar memos or instructions. He also said that he would have preferred it if the memo had been sent to his home address because all staff had access to the email sent to the office.

[40] There was no response from Mr Peter.

*Letter from Mr McGinn responding to concerns about terms and conditions dated 25 May 2018*

[41] On 25 May 2018 Mr McGinn wrote to First Union and briefly responded to some of the “fresh matters” in Ms James’ second letter of 20 April 2018 about Mr Grierson’s concerns regarding his employment. Mr McGinn advised in the letter that Metallic Sweeping would be prepared to participate in a mediation to address the issues although noted interpretation of the hours and availability clause in the agreement may require a formal ruling from the Authority. He wrote that there has been a development that may supersede these issues in the short term with his client raising some serious allegations with Mr Grierson and attached a letter from Mr Peter of the same date which had been addressed to Mr Grierson directly.

*Letter from Mr Peter containing allegations of serious misconduct dated 25 May 2018*

[42] Mr Peter advised Mr Grierson that he needed to meet with him to investigate allegations of serious misconduct associated with an attempted breach of purchasing policy and communication with other staff suggesting a breach of confidence. There were six allegations in the letter.

[43] Four separate allegations arose from the one exchange between Mr Grierson and another employee R on 9 May 2018. On that day Mr Grierson approached R up to 4 times about a guitar listed on Trade Me. R wrote an account of what occurred on 24 May 2018 and that was attached to the letter to Mr Grierson as was an account from Mr Sheldon and another employee S who had overheard one of the discussions between R and Mr Grierson that day.

[44] The fifth allegation was a breach of confidence from sharing details with employees of his dispute with the company over personal terms and conditions and associated lack of judgement. There was reference to a text message that Mr Grierson had sent to R and it was alleged that Mr Grierson had discussed the dispute over hours of work and pay issues with other staff and had not treated the matter in confidence. It was said that this action exhibited a serious lack of judgement. The text message to R from Mr Grierson was set out in the letter and provided as follows:

Hi R. Clive found out on Thursday that I’m a union member because Rachel emailed him and told him that First is now representing me and could he reply to the letter that my lawyer sent a month ago. On Friday, he sent me a memo revoking my email access to the company phone and has told me to

stop using my laptop at work for company business! What a petty little prick he's being. Rachel is gearing up for a fight.

[45] The sixth allegation was broad and was that the cumulative effect of all the matters lead to a resulting destruction of trust and confidence.

*Proposed suspension*

[46] At the end of the 25 May 2018 letter there was a proposal to suspend Mr Grierson on pay because of the "gravity of the allegations with serious trust and confidence issues arising and my perception that you have a propensity to involve other staff in your employment issues." It was stated that the suspension will take place on an interim basis from receipt of the letter and Mr Grierson was required to leave work forthwith. He was given an opportunity to make any submission on the suspension and whether it should continue in writing no later than 12pm 28 May 2018.

*Decision to continue on suspension*

[47] Ms Boyack wrote to Mr Peter on 28 May 2018 by email and raised two matters. The first was that there was no provision for suspension in the employment agreement. The second was that she wanted a copy of the purchasing policy that she said was relied on for suspension.

[48] Mr Peter responded on 28 May 2018. He set out that there was justification for the suspension although the ability to suspend was not in the employment agreement. He noted that he was concerned to protect staff from undue influence in the investigation and that he managed Mr Grierson remotely. He stated that the issues raised about Mr Grierson's knowledge of the purchasing policy went to the substance not the appropriateness of the suspension. He explained that the policy is extremely simple and that staff seeking to purchase items from the re-use store need to obtain Mr Sheldon's permission and that Trade Me policies on withdrawal of items from auctions are well known to staff and published on the Trade Me website.

[49] Mr Peter said that he had since been advised by Mr Sheldon that when he gave the letter of 25 May to Mr Grierson he threw his vehicle and office keys on the desk before storming out. Mr Grierson denied doing that or that he was told he could retain the keys.

Mr Peter wrote that Mr Sheldon was able to point out that the company did not require the keys but Mr Grierson did not seem to care. Mr Peter confirmed the suspension until the conclusion of the investigation.

### **What were the reasons for dismissal?**

[50] The reasons for dismissal are contained in a letter from Mr McGinn to Mr Iddamalghoda dated 7 June 2018. That letter sets out the findings about the allegations and a preliminary view that there should be a disciplinary outcome of summary dismissal. The 14 June 2018 letter of dismissal does not repeat or on its face modify the findings but rather after addressing some additional submissions from Mr Iddamalghoda confirmed the disciplinary outcome of summary dismissal. Although there were six allegations there are eight findings. I will set them out below.

[51] It was found that Mr Grierson in seeking to purchase a guitar attempted to breach and encouraged a staff member to breach company policy that all second-hand goods that an employee may wish to purchase must first be approved by the site manager. It was stated that although the policy was not written Mr Grierson was aware of it and sought to avoid its application so he could buy the guitar cheaply.

[52] It was found that in seeking to arrange the removal from a Trade Me auction of goods listed by the company so that he could purchase them for himself, Mr Grierson attempted to breach Trade Me purchase policy, threatening the company's continued use of Trade Me as a vehicle for the sale of [Metallic Sweeping's] second-hand goods. It was stated that having been told he was not permitted to stop the auction Mr Grierson unreasonably persisted and was reckless as to the consequences.

[53] It was found that these attempted breaches had the potential to bring the company into disrepute and damage Metallic Sweeping's relationships with Council and Trade Me. Further that there was a real risk of reputational harm arising from Mr Grierson's actions saved by R's "stoic refusal to comply with Mr Grierson's wishes."

[54] It was found that these attempted breaches of policy point to a serious failure in judgement and a lack of integrity with resulting loss of trust and confidence in Mr Grierson as

a manager to the point where it is destructive of the working relationship. It was noted in relation to this matter that two junior staff felt sufficiently disturbed by Mr Grierson's inappropriate behaviour to express their concerns formally.

[55] It was found that there has been a breach of confidence arising from Mr Grierson sharing details with employees of his dispute with the company over personal terms and conditions and this points to a serious lack of judgement. There was reference to a view on behalf of Metallic Sweeping that a senior manager who had his issues with his employer in the nature of a dispute should not publicise such matters with junior staff and not be aware of the potential damage such actions might have on the employer's relationship with other staff. This was said to be particularly so when the employer is categorised as "a petty little prick".

[56] It was found that Mr Grierson's explanation via his advocate that his text to R was consultation with the union delegate caused Metallic Sweeping to question his integrity and honesty when the same message was sent to T who was not a delegate. The words contrived and not honest were used with respect to his explanation.

[57] It was found that Mr Grierson's conduct in making staff "uncomfortable, drained and finding it odd" is unbecoming of a manager and shows poor judgement making him less effective as a manager who has to exercise authority over staff.

[58] Finally it was considered that the cumulative effect of the above matters had resulted in the destruction of trust and confidence in Mr Grierson.

### **Substantive justification**

[59] There was no dispute that Mr Grierson was summarily dismissed. I have objectively assessed whether a fair and reasonable employer could have concluded that Mr Grierson's conduct amounted to serious misconduct.

[60] The first four reasons for Mr Grierson's dismissal arose out of exchanges between Mr Grierson and R on a single day on 9 May 2018. Mr Grierson did not dispute R's account of what occurred. That was provided by her after Mr Peter attended at the Blenheim office on 23 May 2018. Mr Peter said that on that day he was approached by a "number of staff to express concerns about Mr Grierson's behaviour." Mr Peter said that he asked staff concerned to email him statements.

[61] R's account dated 24 May 2018 is set out below:

Hi Clive

Pete approached me on up to 4 occasions during the day of 9<sup>th</sup> of May about the guitar that came into the Re Use Shop that it[sic] I had already listed on trade me.

He first approached me at the shop and looked at the guitar as there were already watchers and a bid I told Pete that the auction had started.

He approached me again during the day saying he was a musician. I said its too late there are bids on the guitar. It's staying on Trade Me.

He then approached me again in the office when I was on Trevors computer and said "I know you can unlist it" I said no again and was pretty angry by this point.

He then came to me once again asking if he could take it home for a play. But I explained that id taken photos and thats the condition the guitar was seen on Trade me..so once again NO!!

It wasnt so much that I was uncomfortable, it's the point where we are trying to keep staff honest and pay for everything fairly (which they are) I just think it was rude and unnecessary to keep nagging me about it to the point I was angry and repeating myself.

Thanks R

[62] It was common ground that R complained on or about 9 May to Mr Sheldon who then raised the matter with Mr Grierson. On hearing that he had upset R Mr Grierson promptly apologised to her. He considered the apology had been accepted and heard nothing further until 25 May 2018 when he was provided with the allegations about the exchange. R did not refer to the apology in her statement to Mr Peter.

[63] Mr Sheldon also provided a statement to Mr Peter dated 24 May 2018. His statement commences with "At no time did Peter approach me to purchase a guitar from the shop, as it [sic] the required procedure and which he is fully aware of." Mr Sheldon said in his statement that he approached Mr Grierson after R's complaint and told him it was totally unacceptable and as an assistant manager he should know better. Some weight was placed by Metallic Sweeping on the reply that "he shouldn't have done it but thought he may be able to get it for \$20."

[64] Mr Grierson consistently maintained in his explanation that he was unaware of any policy, rules or procedure that may have been instructions regarding staff purchases. He did

say throughout the disciplinary process that he would welcome clarity for the future if the rules were advised.

[65] There was no written policy provided during the disciplinary process and Metallic Sweeping accepted that there was no written policy as such. Metallic Sweeping relied on what was stated about the relevant policy/rules in the various letters throughout the disciplinary process and the fact that Mr Grierson knew the Council had a financial interest in sales. It was put in those letters initially that company policy was that all second-hand goods that an employee may wish to purchase must first be approved by the site manager who is Mr Sheldon.<sup>1</sup> That accorded with Mr Sheldon's statement of 24 May 2018.

[66] During the disciplinary process it was put by Metallic Sweeping that Mr Sheldon had advised Mr Grierson of the process/rules. Mr Grierson however denied that he had a conversation about rules with Mr Sheldon. Mr McGinn set out in a letter dated 31 May 2018 amongst other matters that Mr Sheldon sets the price for items over \$50 which seemed to be the closest resemblance to what the rules for staff purchase actually were. Read as a whole the letter did not clearly state what the rules actually were.

[67] It was not until the Authority investigation process that the rules for staff purchasing from the shop were disclosed. These were found in emails in March 2018 between Mr Peter and the Marlborough Council. The procedures in that email exchange on closer analysis did not apply easily, if at all, to the events of 9 May 2018. The rule for other than shop staff was that an employee must go to the shop to purchase an item which is priced by shop staff and if over \$50 the item was priced by Mr Sheldon. The item is then paid for and a receipt signed and given. A receipt must be shown by a staff member if asked for. The events of 9 May never progressed to the stage where the guitar was withdrawn from the auction and sold through the shop.

[68] It was further unclear when the rules are considered where the requirement is that "all second hand goods that an employee may wish to purchase to first be approved by the site manager." This was referred to throughout the disciplinary process including in the finding of serious misconduct as the basis of an attempted breach by Mr Grierson of the policy.

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<sup>1</sup> See letter from Mr Peter of 25 May and 28 May about suspension.

[69] I do not find that it was open to a fair and reasonable employer to conclude a breach of rules about staff purchasing. Metallic Sweeping could not establish clearly throughout the disciplinary process what the rules were that were broken or how those rules applied to what actually occurred.

[70] There were no rules about an auction that were disclosed to either Mr Grierson or the Authority. Trade Me terms and conditions provided to the Authority at the investigation meeting did not seem to support that it was not possible to withdraw a listing provided it was not in the last hour of an auction. A small fee may have been incurred. Mr Grierson explained that he believed that it could be withdrawn from his own experience with Trade Me and that is why he said that to R on 9 May 2018. There was no basis not to accept that was his genuine view or that he had been instructed otherwise about Trade Me purchase policies during this employment at Metallic Sweeping. There was no basis for findings of serious misconduct about attempts to breach Trade Me purchase policies and a threat to Metallic Sweeping's continued use of Trade Me on 9 May 2018.

[71] It follows that there is no basis for the third ground of serious misconduct about attempted breaches and any reputational damage. It also follows that a fair and reasonable employer could not find serious misconduct on the basis of the fourth ground relied on about breach of trust and confidence.

[72] There were four separate allegations of serious misconduct flowing from these exchanges. The procedures/rules that it was alleged Mr Grierson "attempted to breach" were not fully set out during the disciplinary process to properly enable him to respond. There was a serious lack of care in setting out what in fact the rules were to enable a proper explanation. Had they been set out fairly and in good faith at an early stage it would have been apparent that there had not actually been a breach of the rules that the company had about staff purchasing. That is because R did not agree to unlist the guitar.

[73] Whilst Metallic Sweeping was disappointed that Mr Grierson persevered with his exchanges that day with R about the guitar I do not find that a fair and reasonable employer could have concluded there was serious misconduct. Objectively assessed the real concern for R was that Mr Grierson had persisted in asking about the guitar and she considered that rude and unnecessary and had become angry. It was on that basis after discussion with Mr Sheldon that Mr Grierson had apologised.

*Sharing information with other staff and breaching confidence*

[74] The allegation was initially set out that Mr Grierson had breached confidence by sharing details with employees about his dispute over his personal terms and conditions and an associated lack of judgement in doing so. In support there was one email from R to Mr Peter attached that stated she did not appreciate being interrupted with work matters when she was on holiday and that she found it a bit “odd” to involve others in the workplace. That was with reference to a text message which was set out in the first letter to Mr Grierson containing the allegations dated 25 May 2019. There was only one other concern attached to that letter that could be attributed to sharing information. It was from S. She wrote that on 22 May Mr Grierson asked her if she had heard he had work emails taken off his laptop and phone and she had not heard. S then wrote that Mr Grierson told her it was to stop him working at home but that he had only worked at home once and it was “bullshit.”

[75] At the only disciplinary meeting on 30 May 2018 which was by all accounts a highly unsatisfactory meeting the Union advised that R was a union delegate. Upon hearing this it was stated by Metallic Sweeping that it knew of others that Mr Grierson had spoken to. Some concerns were raised about this by the Union who saw it as withholding of information. Three further letters were then attached to a letter from Mr McGinn dated 31 May 2018 for the first time. One was from an employee T who said that she had received the same text message as R. Another employee C wrote that Mr Grierson had told her he was annoyed about his KiwiSaver, that he worked in excess of 40 hours but had his pay docked when he had a day off, his pay slips were wrong and he referred to involvement of a lawyer. That employee said she found the conversations “draining” because they were not her business. There was a statement in C’s letter that he talked to others as well about his issues. The third letter was from an employee J who said that Mr Grierson when they were out for work together had talked about Mr Peter and said that he would not answer emails and that he had been underpaid. The employee responded “bugger that sucks.”

[76] Mr Grierson’s explanations at the disciplinary meeting and in writing after that time were that none of those who had communicated with Metallic Sweeping about the concerns had complained to him or led him to believe they regarded his disclosure as improper. Further that the comments had to be seen in a context where there were longstanding and unresolved issues about loss of email privileges, unpaid overtime, wrongful deductions of

wages and other matters. Finally that the information disclosed was “personal information” to Mr Grierson and it was unclear how Mr Grierson could have breached confidence in relaying his own information.

[77] Mr Iddamalgodu also provided Mr McGinn with a list of cases relevant to determining whether or not there was serious misconduct. It was also stated that there had not been any issues with the comment “petty little prick” during the disciplinary meeting. It was explained that this was in the context of a private conversation and not an abusive comment to Mr Peter. Mr McGinn referred Mr Iddamalgodu to the text set out in the first letter containing the allegations of 25 May 2018 which contained that reference.

[78] It was concluded by Metallic Sweeping that the discussion with other staff about the matters in dispute was serious misconduct. There was reference to breach of confidence, serious lack of judgement and that Mr Grierson should not have publicised the matters he was in dispute about. There was reference to the potential damage such actions may have to the employer’s relationships with other staff with some reliance placed on the reference to Mr Peter as a “petty little prick.” There was a separate finding that Mr Grierson’s conduct in making staff “uncomfortable, drained and finding it odd” was unbecoming and showed poor judgement making him less effective as a manager although that was not an original allegation. There was also a finding that the raising of the fact R was a delegate called into question Mr Grierson’s integrity and honesty because he had set a text to T as well.

[79] A fair and reasonable employer could have in all the circumstances concluded that Mr Grierson did not know employees were concerned about what he was saying to them until these allegations were brought to his attention.

[80] The communications with R and T were private. T had deleted the text message however said that the one received by R was the same as she received. The references to revoking the email access on the company phone and stopping using the laptop for company business in the text messages were not confidential. Mr Peter did not ask Mr Grierson to keep that instruction confidential and it was simply an operational matter. The text messages contained an unfortunate reference to Mr Peter which objectively could be the only aspect of concern about the content of the private messages. A fair and reasonable employer could have been expected to have weighed the private rather than public nature of the communications in assessing any gravity of the conduct about the comment made about

Mr Peter. Further that the comment was made with reference to the removal of email privileges and not with more general application.

[81] I accept that the position held by an employee may be significant in respect of an assessment of the alleged misconduct. Mr McGinn in his communication of the decision to dismiss variously used the terms “senior manager” and “assistant manager” to refer to Mr Grierson. The reference to “senior manager” casts doubt on the proper assessment and weighing of relevant factors. Mr Grierson was not a senior manager and objectively assessed was not treated as one.

[82] R on an objective basis had been or was a delegate at the material time. The reasoning about any serious misconduct that flowed from that explanation is somewhat difficult to follow. In any event it could not objectively assessed be serious misconduct.

[83] Mr Grierson had a dispute with the company and the conduct needs to be seen in that context. He had raised issues since October 2017 without resolution about fundamental aspects of his employment. Objectively assessed a fair and reasonable employer could not in all the circumstances conclude the conduct by Mr Grierson in discussing issues with some employees disclosed during the disciplinary process was conduct that deeply impaired or was destructive of the basic trust and confidence essential in any employment relationship.

[84] A fair and reasonable employer could have instructed Mr Grierson not to talk about the issues with other employees pending resolution of the contractual and statutory issues he had raised about his employment. A fair and reasonable employer could have worked on resolving the issues in good faith between the parties that had been raised by Mr Grierson. This could have ensured a functional and workable relationship for the future that met the needs of all parties.

[85] A fair and reasonable employer could not in this matter in all the circumstances have concluded the effect of the matters relied on for summary dismissal cumulatively destroyed trust and confidence in Mr Grierson.

[86] The dismissal was not substantively justified.

## **Procedural fairness**

[87] I have found that a fair and reasonable employer could not conclude there was serious misconduct. The process objectively assessed was lacking in good faith. Allegations were confusing and overstated so that they appeared extremely serious and overwhelming in a way that did not reflect the reality. It was difficult for Mr Grierson to be able to properly provide explanations in those circumstances. Information that was known about by Metallic Sweeping about the rules and additional concerns from other employees was not put or not put initially. Matters raised in defence were not adequately considered with an open mind. The only disciplinary meeting held was agreed to be almost completely inadequate with communication thereafter in writing.

### **Could a fair and reasonable employer have reached the decision to dismiss?**

[88] I do not find for the above reasons a fair and reasonable employer could have reached the decision to dismiss. The dismissal was substantively and procedurally unjustified.

[89] Mr Grierson has made out his personal grievance that he was unjustifiably dismissed. He is entitled to consideration of remedies.

## **Remedies**

### **Two allegations of after discovered serious misconduct**

#### *Working whilst on suspension*

[90] Mr Grierson undertook some other work over 8 days whilst on suspension. There was confirmation that it was work of a casual nature. Mr Grierson could therefore turn down a shift at any time and return to work with Metallic Sweeping. Mr Grierson said that he worked whilst suspended for medical reasons as he felt better when working. There was some medical support provided for that. He also checked with the Union before undertaking the work.

[91] Mr McGinn makes a relevant point that Mr Grierson should have checked with Metallic Sweeping about working whilst on suspension. The amended statement in reply suggests that this “apparent unauthorised moonlighting” if discovered may have led to Mr Grierson’s dismissal. Mr Grierson explained why he undertook the work and this was

supported by some medical information. He said he checked with the Union before doing so. The work was of a casual nature enabling him to present if required to recommence working for Metallic Sweeping. It would have been expected that Metallic Sweeping would have given a day's notice of any return to work enabling completion of the immediate shift of casual work.

[92] I do not find that in all the circumstances it was the type of behaviour that could be classified as after discovered serious misconduct and have an impact on remedies.

*Raising concerns with First Union about other employees concerns before raising with his employer*

[93] This second allegation of after discovered serious misconduct arose from matters disclosed for the first time in Mr Grierson's statement of evidence. The conduct of concern to Metallic Sweeping was that in or before February 2018 Mr Grierson contacted Ms Boyack from the Union and told her about issues raised with him that Metallic Sweeping was not paying employees correctly, there were issues with holiday pay, KiwiSaver, deductions from pay and health and safety issues.

[94] Mr McGinn said that Mr Grierson should have raised matters directly with Metallic Sweeping and given them an opportunity to resolve issues if there were any. There was a concern that Mr Grierson did not advise Metallic Sweeping of his intentions or contact he had had with the Union even when there were subsequent issues with union access. Further that Mr Grierson was seeking to harm the relationship and gain support for his own issues and breached duties of fidelity, loyalty, good faith and clause 2.4 of his employment agreement. Finally it was stated that the Union has not pursued any matters involving other employees. Mr McGinn said that had Metallic Sweeping been aware of Mr Grierson's actions it would have lost trust and confidence in him to the extent that he could have been dismissed.

[95] Mr Grierson said that he was approached by employees with concerns on a regular basis. He said that he had raised these issues with Mr Sheldon as had the other employees but nothing had been done about them even though some issues were quite historical. Mr Sheldon denied that he had been approached by either staff or Mr Grierson about concerns. He did however accept in his evidence that it was not uncommon for employees to "whinge and make snide remarks about their pay." I find that it is less likely that employees

did not raise issues with Mr Sheldon. He was contract manager in Blenheim. R for example went to him about her concern with Mr Grierson's actions on 9 May rather than to Mr Peter in the first instance. Mr Sheldon accepted Mr Grierson had raised his own issues with him on occasion.

[96] Ms Boyack in her evidence said that she was approached by Mr Grierson and met with him and R about concerns at the site. The issues she said in evidence that were discussed were about low employee morale, poor health and safety, lack of pay rises, KiwiSaver not being paid and deducted and absenteeism with a "disengaged team."

[97] I am not satisfied from the evidence that Mr Grierson was involved with union access to the site about which there was some disagreement.

[98] I have accepted as more likely employees had raised the concerns with Mr Sheldon but they told Mr Grierson nothing had been done as a result. Mr Grierson knew from previous employment the Union was involved in the waste industry. He said that he decided to approach the Union primarily to help other staff. Mr McGinn suggested that he was using other employees as a vehicle for his own issues. I find that less likely. In March 2018 Mr Grierson instructed Ms James and not the Union to pursue his concerns. He did not join the Union until May. Ms Boyack said that she met with a group of workers from Metallic Sweeping with concerns along the lines discussed with Mr Grierson however they were concerned with confidentiality because they had a fear of retaliation if it was known that they had joined the Union.

[99] Mr McGinn submitted that going to the Union without raising all of these issues with Mr Peter first was a breach of good faith, fidelity, loyalty and the employment agreement.

[100] Employees can approach third parties for assistance with employment issues on their own behalf or on behalf of others without breaching good faith, fidelity and loyalty obligations. They can for example approach the Labour Inspectorate, WorkSafe or contact an employment helpline or a Union if there are concerns in the worksite. The issue here appears to be Mr Grierson was a manager.

[101] Mr Grierson was a low level manager who felt he had unsuccessfully attempted to resolve his own issues since October 2017. He described in his written evidence that for

much of his time in the employment at Metallic Sweeping he had a “hellish experience.” He said that he kept working in the hope that his problems raised would be resolved.

[102] Mr Peter was concerned that Mr Grierson failed to raise concerns directly with him and displeased by finding out about the approach to the Union in the statement of evidence. Mr Grierson had raised his own issues with Mr Peter and he felt they had not been resolved. Unfortunately Mr Grierson said he became concerned about further interactions with Mr Peter and nervous about interactions with him. By March 2018 he describes in his written evidence that he had “lost all hope” that Mr Peter would resolve the problems. He referred to Mr Peter “having a hostile attitude when questioned or challenged.” Mr Peter denies in his evidence that he was aggressive with Mr Grierson about the hours of work concern raised in January 2018 and I am not in a position to conclude otherwise. I do note however that he did not disagree when concerns about hours were raised he may have questioned Mr Grierson whether it was the right job for him.

[103] In his written evidence Mr Grierson stated that he thought the situation with staff was getting “out of control.” There was no evidence that he was trying to harm the relationship as Mr McGinn alleges by going to the Union or that in fact he did. The Union have good faith obligations in its dealings with Metallic Sweeping. Mr Peter would have had the ability to comment about any of the concerns raised through the Union and be able to give his view. Having raised the concerns the Union then dealt with the employees directly.

[104] I am not satisfied that what occurred when Mr Grierson went to the Union was misconduct in all the circumstances. Subsequently discovered misconduct needs to be of a truly significant nature. It was simply not that type of conduct.<sup>2</sup>

#### *Lost Wages*

[105] Mr Grierson seeks three months lost wages. He obtained new employment on Monday 18 June 2018 after his dismissal on Thursday 14 June 2018.

[106] Section 128 of the Act provides for reimbursement where it is found that the employee has a personal grievance and has lost remuneration as a result. If the section applies then the Authority must, whether or not it provides for any of the other remedies, order the employer

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<sup>2</sup> *Salt v Governor of Pitcairn and Association Islands* [2008] NZCA 128

to pay the employee the lesser of a sum equal to lost remuneration or to 3 months' ordinary time remuneration.

[107] Mr Grierson received a salary of \$55,000. The Authority has been provided with a summary of earnings for Mr Grierson from the Inland Revenue Department from 1 April 2018 to 31 March 2019. The first issue for the Authority is whether there was a loss and then whether it is less than 3 months ordinary time remuneration.

[108] The period between 14 June 2018 and 31 March 2019 is 41 weeks and 3 days and I have focussed on that period. Over that period the summary of income shows earnings of \$41,205.05 gross or \$1005.00 per week. On a salary of \$55,000 Mr Grierson received \$1057.70 per week at Metallic Sweeping. The actual loss is \$52.70 per week for 41 weeks and \$31.56 for the 3 days. That is a total lost remuneration of \$2,192.26 for the period from dismissal to 31 March 2019. That is a lesser sum than 3 months ordinary time remuneration and that should therefore be the award for lost remuneration subject to any issues of contribution.

#### *Compensation*

[109] I accept Mr Grierson was hurt and humiliated by his dismissal. Although he had previously been made redundant he had never been dismissed from his employment and described himself as a good worker. Mr Grierson had also shifted from Auckland to Blenheim to take up the role with Metallic Sweeping with the intention of making the most of his new role. He was then joined by his family after their home in Auckland had been sold.

[110] Whilst employed by Metallic Sweeping he had raised some serious concerns about his terms and conditions of employment. These remained unresolved before he was dismissed. In his written evidence Mr Grierson said that he was deeply disappointed and hurt by the decision to dismiss instead of Metallic Sweeping dealing with the actual issues that he considered they had caused. I accept dismissal was significant and distressing for him.

[111] Mr Grierson believed in accordance with his previous management experience that he was dismissed for matters that could not be properly considered to be serious misconduct and that he was treated very unfairly. He did not feel heard during the process. He described in his statement of evidence that he felt "cowed and deeply intimidated" at the disciplinary

meeting but lucky to have competent and strong representation. He considered when explanations were put forward they were not properly considered. He felt the letters sent during the process on behalf of Metallic Sweeping were “repetitive, hostile and aggressive.” I accept that Mr Grierson felt powerless throughout the process and that started before the first disciplinary meeting. He gave evidence of the distress and disbelief that he felt when he was suspended on an initial basis without being able to give some input and that he was in tears at that time and could see the dismissal coming from there. He had asked before suspension for an explanation about why he was no longer able to access work emails on his laptop and cell phone from Mr Peter but there was no reply. He thought that may have been that Metallic Sweeping knew he had joined the Union the day prior.

[112] Mrs Grierson confirmed her husband’s shock and distress. There was concern about the loss of income. She observed he was also unable to leave the worksite with dignity or say goodbye to the other employees. She was concerned there could be a relapse of his medical condition. Mr Grierson undertook the casual work whilst suspended to try to avoid this.

[113] I weigh that Mr Grierson was able to find alternative employment very quickly after dismissal although not in a management role. I also weigh from my observation at the Authority investigation meeting that the inclusion of confidential disclosures about family matters in Mr Sheldon’s statement of evidence caused Mr Grierson emotional distress. The information could and should have been put in a more appropriate way.

[114] Subject to any contribution there should be an award that recognises the considerable degree of hurt and humiliation and the powerlessness in this case weighed with obtaining of other employment shortly after dismissal. I find that a suitable award for hurt and humiliation is the sum of \$22,000.

#### *Contribution*

[115] The Authority, where it determines there is a personal grievance under s 124 of the Act, must in deciding the nature and extent of the remedies to be provided consider the extent to which the actions of the employee contributed towards the situation giving rise to the grievance and if required reduce the remedies that would otherwise have been ordered.

[116] I turn firstly to whether there is any blameworthy conduct in respect of the guitar exchanges. The conversation with R was open and there is no evidential support for a view that there was intention to act fraudulently or in an underhand manner. I accept that Mr Grierson genuinely thought that it was possible to unlist the guitar from sale and indeed there is support that is possible. R would not agree and it was not unlisted. Mr Grierson said in his evidence that the comment to Mr Sheldon that he hoped to get the guitar for \$20 was a throw away comment. I accept that as more likely. Mr Grierson apologised to R. I conclude that in doing so he accepted responsibility for R being upset and addressed the concern R had that it was “rude and unnecessary for him to keep nagging” her about it. I do not find a causal connection or link between what occurred on 9 May and the situation that gave rise to the personal grievance to conclude actions that were culpable or blameworthy on the part of Mr Grierson.

[117] Mr Sheldon accepted some talk of issues with pay and such like took place between the workers at Metallic Sweeping. Mr Grierson agreed that he spoke to others about his concerns. I accept that he was unaware that this impacted on other employees. I could not be satisfied that he knew or in fact turned his mind to the appropriateness of doing this and whether he should exercise some caution in discussing such things. In his position he should have exercised caution in discussing his own issues with others. Some employees reported that this was unwelcome. I weigh the relatively casual and informal nature of the worksite and that there was talk about pay. Mr Grierson also made a reference to Mr Peter that was inappropriate even if he was unhappy with his actions about the email privileges. I weigh he did this in private text messages. The circumstances in this case are most unusual. Most managers even at a low level would not have the range of issues that they considered were unresolved over an extended period of time with their employer. Further they would not consider there were challenges in escalating or raising concerns to the degree Mr Grierson did. In all the circumstances I find a moderate measure of blameworthy conduct about the disclosures and comment about Mr Peter and reduce the remedies above by 10%.

### **Orders made**

[118] Taking contribution into account I make orders as follows:

[119] Metallic Sweeping (1998) Limited is to pay to Peter Grierson the sum of \$1973.03 gross being reimbursement of lost wages under s123(1)(b) of the Employment Relations Act 2000.

[120] Metallic Sweeping (1998) Limited is to pay to Peter Grierson the sum of \$19,800 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s123(1)(b) of the Employment Relations Act 2000.

### **Costs**

[121] I reserve the issue of costs. Agreement may be able to be reached on the basis of tariff. If not Mr Cranney and Mr Iddamalgoda have until 1 November 2019 to lodge and serve submission as to costs. Mr McGinn has until 15 November 2019 to lodge and serve a submission in response.

Helen Doyle  
Member of the Employment Relations Authority