

purchasing the guitar, Mr Simpson failed to use usual diligence and skill by amongst other things failing to be alert to the prospect the guitar was stolen, failing to take the usual checks to ensure the veracity of the information provided, failing to check with the Police data base in respect to the guitar and generally failing to be alert to the prospect that in the particular circumstances of the transaction, it was more likely than not that the guitar had been stolen.

[5] Cash Converters say that in those circumstances, their licence to trade as a secondhand goods dealer is placed in jeopardy.

[6] Shortly before going on a period of annual leave and two weeks after the purchase of the guitar, Mr Simpson was advised by a manager of Cash Converters that he had also failed to enter the serial number of the item which Cash Converters procedures required him to do.

[7] Mr Simpson went on holiday on 16 September 2008 and while he was on holiday he received a letter from Cash Converters summoning him to a meeting. The meeting took place on 30 September 2008 and as a consequence of that meeting, Mr Simpson was dismissed from his employment on the grounds of serious misconduct.

[8] A grievance was promptly raised and the matter proceeded to the Authority via an unsuccessful mediation, in the normal way.

Issues

[9] The only issue for investigation is whether Mr Simpson was unjustifiably dismissed from his employment by Cash Converters.

Was Mr Simpson unjustifiably dismissed?

[10] The sole basis relied on by Cash Converters for Mr Simpson's dismissal was his purchase of the stolen guitar. Mr Simpson's evidence is that he initiated the transaction with the person who brought the base guitar into the store and that he ... *assessed him to be an honest person. As a consequence of this I accepted that the guitar was his to sell.* There was then a discussion between the parties about music after which Mr Simpson offered the person \$220.00 for the guitar. This was accepted

by the person who had brought the guitar in and the transaction was completed at that point.

[11] However, Mr Simpson confirmed in his evidence to the Authority that he had failed to record the serial number of the guitar which Cash Converters' procedure and the law required. Mr Simpson also confirmed to me that he had taken no steps whatever to verify that the guitar was indeed able to be sold by the individual who brought it in and in particular that he took no steps to contact the Police about the transaction. Mr Simpson's explanation for his failure to record the serial number is that he forgot and he sees this forgetfulness as inexplicable and a *one off*. Cash Converters say that after the dismissal, it became evident to them on further inquiry that Mr Simpson regularly failed to record serial numbers on items that he had purchased.

[12] As to the failure to consult the Police, Mr Simpson's evidence was that he was not required to take that step to check the Police data base because nothing put him on notice that the transaction was in any way doubtful. Again, Cash Converters quarrel with that judgment noting that the very fact that the person who presented the guitar for sale was prepared to accept \$220.00 for it ought to have been evidence enough for Mr Simpson that something was very wrong. According to Cash Converters, a genuine owner would have protested the quantum offered by Mr Simpson because the guitar was near enough to brand new and was worth by all accounts well over \$1,000 retail. Cash Converters say that only a person who has no colour of right to the property would accept a figure that was so manifestly inadequate as purchase price for the item.

[13] It became evident almost immediately after the transaction was completed that the guitar had been stolen because the Police advised of that fact. Mr Simpson deposes that he was *shocked* by that revelation as he genuinely believed the seller to be an honest person.

[14] Immediately prior to going on annual leave, (and according to Mr Simpson about two weeks after the purchase) Mr Simpson was confronted by a Cash Converters' Manager complaining about Mr Simpson's failure to record the serial number of the guitar. Mr Simpson immediately fessed up to that omission and undertook to ensure it would not happen again. Mr Simpson then went on leave and while on leave received the summons to attend the meeting at which he was actually

dismissed. Mr Simpson claims that the effect of this process was unfair in the first instance because the issue of the serial number (which he acknowledged) was dealt with in the brief meeting that he had with a Cash Converters' Manager Mr John Steenhert.

[15] Mr Simpson then protests about the efficacy of the disciplinary meeting which took place on 30 September 2008. He was summoned to this meeting, as I have already noted, while on annual leave. The letter instructing him to attend the meeting which was dated 18 September 2008 gave no details whatever, according to Mr Simpson, about the reason for the meeting. It simply referred to *alleged serious misconduct* and invited him to bring a support person. Because he regarded the letter as unhelpful in conveying the purpose of the meeting, Mr Simpson rang the author of the letter, Austin Brown, the Cash Converters' Christchurch Branch Manager. Mr Simpson describes a *happy go lucky* telephone conversation with Mr Brown in which Mr Brown confirmed that the meeting was about the stolen guitar but according to Mr Simpson gave the impression that it was *no big deal* and made *no threats*. Mr Simpson wanted me to understand that the nature of that telephone discussion effectively lulled him into a false sense of security about the meeting. In particular, Mr Simpson wanted me to accept that whatever he had done wrong, his employment was not in jeopardy.

[16] Mr Brown had an entirely different recollection of that telephone discussion. Although he agreed with Mr Simpson that the conversation was very short indeed, he rejected absolutely that it was a *happy go lucky* conversation and he denied conveying the impression that the matter was not serious.

[17] At the disciplinary meeting itself which followed on 30 September 2008, Mr Simpson did not have a support person with him and he invites me to conclude that he was treating the matter less seriously than he ought to have because that was the way in which Cash Converters had presented it to him. Of course, Cash Converters deny absolutely that that is the correct interpretation, note that the suggestion that Mr Simpson bring a support person was contained in the initial letter and deny that anything that Mr Brown said was meant to be interpreted as an attempt to minimise the seriousness of the situation. Mr Simpson's approach to the matter was to accept that in failing to record the serial number he had committed an error, but

that that error was not of itself *particularly serious* and that he certainly ... *did not have any idea that (his) employment was at risk.*

[18] Mr Simpson taped the 30 September 2008 meeting (entirely without the consent of Cash Converters who knew nothing about the taping) but a transcript of the meeting is, as a consequence, now available. Mr Brown told me that he did not quarrel with the text of the transcript and accepted that it was accurate.

[19] Mr Simpson alleges that the meeting was so perfunctory as to be derisory. Despite that allegation, the meeting commences with the employer's statement that the purpose of the meeting is *a serious disciplinary matter* and that Mr Simpson had been invited to bring a support person but had declined. Mr Simpson acknowledged that and Cash Converters then went on to identify how serious the matter was by referring to the Police and a variety of senior managers in the employer organisation concluding that statement with the ringing phrase *its definitely way up there mate.*

[20] Then Cash Converters proceeded to identify questions they needed answers to, of which the first was to ask Mr Simpson what steps he took to ascertain the ownership of the base guitar. Mr Simpson responded by saying that he remembered talking to the alleged vendor about music *but I can't remember the conversation enough to get into it.* Then Mr Simpson confirmed in response to another question that he had not rung *Comms* (that is to say the Police data base) and Mr Simpson then confirmed that by failing to record the serial number he had broken the law and finally that by failing to record the serial number he had also broken Cash Converters own policy. That part of the meeting then concluded with Cash Converters taking an adjournment to consider matters further. When the meeting reconvened after a 20 minute recess or thereabouts, Cash Converters indicated that their *preliminary decision is to move to dismiss.* This was followed by a question to Mr Simpson as to whether he had anything to say and his response to that seems to have been deflected somewhat by Cash Converters emphasising that the decision was made on the basis of a finding of serious misconduct. Then without further ado the final decision was conveyed to dismiss on the grounds of serious misconduct.

[21] On the face of then, this was a particularly short disciplinary meeting but it is difficult to see (with perhaps one exception) what else the employer could have done to make it take longer. There was no doubt that the elements of the serious misconduct had been identified. Mr Simpson had already confirmed prior to the

disciplinary meeting that he had failed to record the serial number on the purchase as he was required by law and by Cash Converters' own policy to do. Furthermore, the elements of the rest of the serious misconduct allegation would have been established before Cash Converters met with Mr Simpson. They must have already been absolutely clear (from their contact with Police) that Mr Simpson had not used the Police data base as a check when the purchase was made. Further, Mr Brown's evidence to me in my investigation meeting was as clear as could be that an experienced operator like Mr Simpson ought to have known that the transaction was a risky one. Mr Brown said:

The minute I saw this item I was sure it was dodgy. There were so many issues that should have set off alarm bells in Andrew's (Mr Simpson's) mind.

[22] Later on in answer to the direct question from me, Mr Brown answered my question by repeating it and then adding his answer as follows:

How does someone so experienced make such a mistake? It absolutely beats me.

[23] So in my judgment, the elements of the serious misconduct were already established before the disciplinary meeting, either by Mr Simpson's own concession (in relation to the serial number when he spoke with Mr Steenhert) or via third party sources during the employer's enquiries in preparation for the disciplinary meeting.

[24] The fact that Mr Simpson thought the matter was not serious and would not jeopardise his employment simply is another basis for calling his own judgment into question. I accept without reservation that Cash Converters' procedure was a little less than ideal, especially in terms of the information conveyed in the initial letter, but there is no rule of law that says that disciplinary meetings must take a lengthy period of time in order to fair. As I say, by the time Cash Converters had convened the disciplinary meeting, they had already satisfactorily established the majority of the elements of the serious misconduct allegation. The only other criticism I would make of Cash Converters' process is their apparent willingness to move quickly from a preliminary decision to dismiss to a final decision to dismiss. While I accept that Mr Simpson did not offer anything constructive in his own defence in the interregnum between those two points, a more measured approach would have been better.

[25] However on Cash Converters side one has to say that Mr Simpson could at any point have called the proceedings to a halt and sought further time to get advice or to formulate a more detailed written response. The whole point is that Mr Simpson is an extremely experienced worker in this industry and Cash Converters treated him as such throughout this process. No doubt Cash Converters would have reached different conclusions if Mr Simpson had no experience in the industry.

[26] Mr Simpson also asks me to conclude that a fair and reasonable employer would not have reached the conclusion to dismiss him from his employment in the particular circumstances of this case. In particular, Mr Simpson seeks to have the Authority accept that a sanction short of dismissal would have been appropriate, particularly because of Cash Converters persistent failure to identify anywhere that dismissal was a possible outcome of the disciplinary process. In that latter regard, I think the criticism of Cash Converters is fair; the initial letter ought to have made clear that dismissal was a possible outcome and Mr Brown's introduction at the beginning of the disciplinary meeting ought also to have made it clear that such was a possible outcome of the process.

[27] However, Mr Simpson is not an inexperienced worker in this industry and his attempts to paint himself as somewhat bewildered by the process do not entirely ring true. He was always told the matter was serious, that it was an investigation of *serious misconduct*, that the Police and other senior managers were involved and his experience of the industry ought to have made it self evident to him that his continued employment was in serious jeopardy.

[28] In my opinion, it was available to Cash Converters to conclude that Mr Simpson's breaches constituted serious misconduct and that dismissal was the appropriate remedy. I accept the submissions made on Mr Simpson's behalf that the procedure adopted by Cash Converters was not ideal but as has frequently been observed by the Employment Court and the Authority, the process of evaluating an employer's disciplinary procedure is not a council of perfection. Put another way, it is timely to be reminded of Chief Judge Goddard's observation in the leading case of *New Zealand Food Processing IUW v. Unilever* [1990] 1 NZILR 35 at p.46:

What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not overindulgent person.

[29] Applying that test to the present circumstances, I am satisfied with Cash Converters process.

Determination

[30] For the reasons enunciated in this determination, Mr Simpson's claim fails.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority