

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 439
3222699

BETWEEN

MATTHEW BARRY
Applicant

AND

THE VICE-CHANCELLOR
OF THE UNIVERSITY OF
AUCKLAND
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Lucy Jenkins and Hanna Tevita, counsel for the
Respondent

Investigation Meeting: 1 May 2024

Determination: 23 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mathew Barry was dismissed from his role as a security guard at the University of Auckland for serious misconduct.

[2] After carrying out a disciplinary inquiry the university's campus operations manager Philip Kirkham concluded Mr Barry had "dishonestly acquired" a large television and a power supply unit belonging to the university.

[3] In his application to the Authority Mr Barry said his dismissal was unfair because he believed the television was "obtained legitimately as surplus to requirements". He said the university had acted hastily on an "unsubstantiated single email by a disgruntled flatmate", arranging for the Police to recover the items with a search warrant before investigating his side of events. He complained that Mr Kirkham's investigation took too long, with delays in speaking to him and to a

university contractor heading a project to replace audio-visual equipment in several lecture theatres. Mr Barry said the contractor had given him “the very clear impression” he was “free to remove an unwanted television” from university premises. Mr Barry also criticised Mr Kirkham for “presupposition of guilt” and for being both investigator and decision-maker in the process that led to Mr Barry’s dismissal.

[4] The university, in reply, said Mr Kirkham had carried out a full and thorough process which discounted Mr Barry’s explanation and showed the equipment was removed without authorisation. It said the information gathered supported its conclusion that Mr Barry’s actions in taking both the television and a power supply unit were serious misconduct for which dismissal was the appropriate sanction.

The Authority’s investigation

[5] For the Authority’s investigation written witness statements were lodged from Mr Barry; Mr Kirkham; Grant Thornton, the contractor who carried out the audio-visual equipment replacement project; and Sandra Lem, the university’s former human resources manager. Ms Lem was one of two human resources advisors who has assisted Mr Kirkham during the course of his inquiries.

[6] Each witness answered questions under affirmation from me and the parties’ representatives. Mr Barry and counsel for the university also gave oral closing submissions, with the university also providing written submissions elaborating on relevant legal principles and how they applied to the facts in this case.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

The issues

[8] The issues for determination were:

- (a) Did the university fairly investigate its concerns about Mr Barry’s conduct?
- (b) Were its conclusions that Mr Barry had committed serious misconduct, and should be dismissed for it, within the range of responses open to a fair and reasonable employer in all the circumstances at the time?

- (c) Should either party contribute to the costs of representation of the other party.

[9] Because of the conclusions reached on issues (a) and (b), as explained later in this determination, it was not necessary to consider issues regarding remedies that might otherwise have arisen.

Legal principles

[10] Section 103A of the Act sets a “test of justification”. The test checks whether the information gathered and the assessment made by Mr Kirkham, on behalf of the university’s vice-chancellor as the employer, was sufficient for an employer acting fairly and reasonably to conclude any shortcomings in Mr Barry’s conduct were so serious that the university could no longer have trust and confidence in him performing his duties as its employee and so that it was then justified in its decision to dismiss him.

[11] In applying this statutory test of justification, the Authority must consider whether Mr Kirkham met the required procedural steps of:¹

- (a) sufficiently investigating the allegations; and
- (b) raising the university’s concerns with Mr Barry; and
- (c) giving him a reasonable opportunity to respond to those concerns; and
- (d) genuinely considering his explanation before dismissing him.

[12] The dismissal, or how it was decided, must not be found unjustified unless any defects in the process followed were more than minor and those defects then resulted in Mr Barry being treated unfairly.²

[13] The test of justification also allows for a range of responses, so the outcome decided by one employer may justifiably differ from one that another employer might take, provided the outcome in the particular case is one reasonably and fairly reached.

[14] The Authority’s assessment of whether the employer has acted reasonably and fairly is made on the balance of probabilities, that is what is more likely than not to have been so.

¹ Employment Relations Act 2000, s 103A(3) and (4).

² Employment Relations Act 2000, s 103A(5).

Context

[15] Mr Barry has been enrolled as a student on a part-time and full-time basis at the University of Auckland from 2017 through to 2024, completing one degree and then undertaking study for a second degree. During those years he has also had part-time employment at the university. In 2020 he worked as a technologist in an area for students working on individual projects called Unleashed Space. In 2021 and early 2022 Mr Barry had worked as a receptionist in a hall of residence. He began work as a security guard on 13 June 2022.

[16] On 14 June, his second day of work as a security guard, Mr Barry was one of three security guards involved in arranging access to seven lecture theatres for Mr Thornton and his three teams of workers to remove some audio-visual equipment and install new equipment. The installers' work included placing unique number asset tags on new equipment and noting the unique number asset tag already on the equipment being removed. This tag information is used in a central register to record the location of each item of equipment.

[17] The 'swap out' being carried out on that occasion comprised projectors, speakers and one 55" television. Removed equipment was placed in storage rooms for potential use elsewhere or, where not needed, potential sale or disposal through an e-waste disposal process.

[18] During that day Mr Barry asked Mr Thornton what would happen to the removed equipment. In his later explanation to Mr Kirkham Mr Barry said Mr Thornton's answers to his questions gave him "the very clear impression I was free to remove an unwanted TV as it was simply going to be scrapped".

[19] On the following day Mr Barry shifted the television from the secure room where it had been left and put it in a locked storeroom in the Unleashed Space area. Mr Barry knew how to access that storeroom from his previous work as a technologist in that area. The Unleashed Space co-ordinator later told Mr Kirkham that Mr Barry had told him about storing a television in the room but it was in a box, which the co-ordinator did not open.

[20] On 15 June Mr Barry used his own car to pick up the boxed television and take it to his flat.

[21] Sometime in the following weeks Mr Barry also took a power supply unit from university premises. He needed the unit to operate the television. Where the unit came from, and whether it was taken without permission, were questions that arose in Mr Kirkham's later inquiry.

[22] On 20 July a flatmate of Mr Barry sent an email to a university address with this subject heading: "Potentially stolen TV from UoA". The email said Mr Barry had "returned home the other day with a TV he bragged about stealing from the University" and said "he is employed at the University as a security guard". Attached to the email were photos of the television, the power supply unit and the tags attached to them. One photo was a close-up shot of a sticker on the television showing its model and serial numbers and of a tag labelled "The University of Auckland" with a bar code and unique identity number. The flatmate's email said he was "uncomfortable with the thought of stolen property being present in my living space and wanted to bring this to your attention".

[23] The email was forwarded to Mr Kirkham on 25 July. On 1 August Mr Kirkham was in touch with a Police officer who was part of a Police liaison team for the university. Mr Kirkham provided the photos sent by Mr Barry's flatmate and referred to a discussion between a university colleague and a Police officer about issuing a search warrant. To assist the Police Mr Kirkham also contacted the flatmate to check the television was still in the flat. Police officers then executed the search warrant on 4 August, taking the television, a power supply unit, a television remote and a television stand. A Police officer also contacted Mr Kirkham that afternoon to confirm the search was successful and asked if Mr Kirkham was "able to provide evidence that the TV wasn't discard[ed] and/or removed by [lecture room] staff prior to the TV being taken". Mr Kirkham responded that no sale or destruction of the television had been authorised and that it was still recorded on the university's asset register as an asset.

[24] On the same day that the search warrant was executed, at a time when Mr Barry was at work, Mr Kirkham called him to a meeting.

[25] In the meeting Mr Kirkham told Mr Barry of his concern that Mr Barry may have removed a television from the university campus and relocated it to his home without authorisation. Mr Kirkham told Mr Barry this could be serious misconduct. This concern and the steps that Mr Kirkham would take to investigate it were set out in

a letter drafted for him by a human resources advisor and given to Mr Barry in the meeting. The letter included a proposal to suspend him from work, on full pay, for the duration of the investigation. Mr Barry was also told he would not be allowed to enter university premises while that investigation was underway.

[26] Although the letter said the purpose of the meeting was only to discuss suspension, with time to seek advice, Mr Barry had agreed by the end of that meeting to being suspended on pay.

[27] The letter also said Mr Barry was not required to respond to the substantive allegations at that time but would have an opportunity to do so at another meeting yet to be set. It advised Mr Barry that “prior to this meeting you will be sent all relevant information relating to the matter and an opportunity to respond”.

[28] The following day, 5 August, Mr Barry sent Mr Kirkham an email asking to be allowed ongoing access to the campus in order to attend lectures, seminars and laboratory sessions. By letter on 9 August Mr Kirkham confirmed Mr Barry’s access to campus to attend timetabled lectures, labs and tutorials.

[29] In the following weeks Mr Kirkham interviewed Mr Thorburn about his recall of talking with Mr Barry on the day that the television was taken down.

[30] On 22 August Mr Kirkham advised Mr Barry, by letter, that he wanted to meet with him to get “any additional information that might explain how these university items Sony TV – UoA asset number 358318, TV stand, and remote controller came to be in your possession”. The letter included the text of the email from Mr Barry’s flatmate to explain how the issue came to the university’s attention.

[31] In a meeting on 26 August Mr Barry provided a written statement giving his account of events and receipts for purchase of a remote control and a power unit.

[32] Following that meeting Mr Kirkham interviewed the other two security guards who had been working with Mr Barry on 14 June. Both subsequently signed written statements in which they recalled Mr Barry had asked about the equipment but said they had not heard Mr Thornton tell Mr Barry he could have any of it.

[33] By letter of 7 September Mr Kirkham then called Mr Barry to a formal disciplinary meeting “to discuss the university’s significant concerns relating to

allegations of theft of university property and to better understand the circumstances of how this property came to be in your possession". The letter said further enquiries had established inconsistencies between Mr Barry's written statement and information gathered from interviewing his colleagues and other staff.

[34] Before that meeting was held Mr Kirkham also interviewed Mr Thornton again and a supervisor in the installation team. The supervisor, according to Mr Kirkham's notes of interview, said Mr Barry had been "really interested" in what would happen to the television but did not ask directly if he could have it and the supervisor and Mr Thornton "definitely did not say he could".

[35] At the disciplinary meeting on 20 September Mr Kirkham summarised his interviews with Mr Thornton, the installation supervisor and the two other security officers who had been working on 14 June. His summary including telling Mr Barry that Mr Thornton denied saying or implying Mr Barry could have the television. Referring to the other three interviewees, Mr Kirkham said they had confirmed Mr Barry asked questions about the equipment and what would happen to it, but they had not heard Mr Thornton say or imply that Mr Barry could take it.

[36] Mr Kirkham also showed Mr Barry a photograph of the power supply unit recovered by the Police from his flat. It showed test code tags that were matched to items registered to a room at the university.

[37] In a subsequent letter, dated 8 November, Mr Kirkham told Mr Barry that swipe card records showed that, while on shift on 24 June and 7 July, he had entered the room where the power cord was registered as being held. The letter accepted the remote control and television stand seized on 4 August were not university property. It also said Mr Thornton and the installation team supervisor were adamant they had told Mr Barry that it was the university's decision on how equipment was disposed of and denied implying he could take the television.

[38] The letter concluded that Mr Barry had committed serious misconduct because he was unable to demonstrate he had acquired the television and the power supply unit with appropriate authorisation. It stated absolute trust and confidence was needed in someone working as a security officer as they generally had unfettered access to university buildings and assets in the course of their duties.

[39] On that basis Mr Kirkham advised that he was proposing to dismiss Mr Barry because serious misconduct had been established and he had lost trust and confidence in Mr Barry as an employee. Mr Barry was asked to respond in writing by 14 November or, if he wished, to attend a further meeting in person on 18 November. He was told termination of employment would commence if he refused to provide written feedback or meet.

[40] Mr Barry's response to that proposal, by email on 14 November, said he had a clear conscience and disputed the conclusion. He said the investigation took too long, was biased and left him feeling the conclusion was foregone from the outset. He proposed resigning in return for a tax-free payment of three months' salary.

[41] By letter of 17 November Mr Kirkham advised Mr Barry that the university was not prepared to agree to his settlement offer and confirmed the decision to terminate his employment immediately.

Flaws in the university's investigation and process

[42] The factors applied in the test of justification take account of "the resources available to the employer" in carrying out its investigation of allegations about an employee.³

[43] In this case the university had considerable resources to carry out a sufficient investigation. In a previous career Mr Kirkham was a long serving police officer with extensive experience in investigation. He had held the campus operations manager role, heading its security services teams, for a decade. Two of the university's professional human resources team also assisted in the course of an investigation which, formally at least, ran for 15 weeks from 4 August to 17 November 2022.

[44] Despite this significant capacity of experience and skill to conduct a disciplinary process to a high standard of fairness and reasonableness, Mr Barry raised some valid criticisms of how the university looked into and decided on its concerns about his conduct in removing a television and a power unit from the campus using access he had to rooms and buildings in his role as a security officer.

³³ Employment Relations Act 2000, s 103A.

[45] Not all of those criticisms, to the extent they may be established, will be relevant to a final assessment of whether the university acted fairly and reasonably. The phrase “all the circumstances at the time” in the statutory test requires an assessment of what the university could reasonably have established when it carried out its investigation. It cannot, for example, be held responsible for information, perhaps relevant in hindsight, which Mr Barry could have put forward for consideration during the disciplinary inquiry but did not.

[46] Flaws or shortcomings in the investigation are then only important to the extent that they are more than minor and, crucially, resulted in Mr Barry being treated unfairly. That assessment includes, to some extent, a counter-factual assessment of what may or may not have happened if some other process or step had been taken or followed. It must, in short, be something that could have made a potential but real difference to the outcome, both in what information was available to the employer and the employee to talk about and what that may have disclosed about what did or did not really happen.

[47] The following alleged defects in the university’s process have been considered in preparing this determination:

- (i) Seeking Police action before checking possible reasons for having the television;
- (ii) Limiting access to campus during the investigation;
- (iii) Failure to disclose information;
- (iv) An unreasonably long investigation; and
- (v) Predetermination in the outcome.

Seeking Police action before checking possible reasons

[48] Due to the size of the university’s central city campus, the Police have a nominated liaison team for contact with the university. Shortly after receiving the email from Mr Barry’s flatmate describing the television as “potentially stolen”, one of Mr Kirkham’s security team colleague contacted a Police liaison officer. Their discussion included the prospect of getting and carrying out a search warrant.

[49] While Mr Kirkham said the Police were solely responsible for deciding to get and carry out a search warrant based on that information, this was not consistent with other parts of his own evidence to the Authority investigation and copies of correspondence between him, his office and the Police liaison officers. On 1 August

Mr Kirkham followed up on his colleague's initial discussion with Police about a search warrant, checking on arrangements for it. Before the warrant was carried out on 4 August, he provided the Police with further information from the flatmate to confirm the television was still at the flat. Mr Kirkham only called Mr Barry in to speak to him, on that same day, after finding out the warrant had been executed. By that time Mr Kirkham had known about the allegation of theft for nine days.

[50] In answers to questions at the Authority investigation Mr Kirkham accepted that at the time of his first email contact with Police about this matter, on 1 August, he did not know if there was any other explanation for Mr Barry having the television. It was only after the items were recovered under search warrant from Mr Barry's flat, that Police asked about this. By email, also on 4 August, Mr Kirkham had then confirmed to Police the television was still recorded as an asset on the university's register and, if disposed of legitimately, the university asset barcode would have been removed and deactivated. He also told Police there would have been an identifiable electronic bank deposit if an unneeded asset was legitimately sold. Neither deactivation of a barcode or such a payment had happened in this case.

[51] Mr Kirkham's evidence to the Authority did not confirm any necessity for immediate recovery of the items by the Police carrying out a search warrant. There was no established risk of removal or destruction of the television or significant effect on the university's ongoing operation if it was not recovered immediately. The university had evidence from Mr Barry's flatmate, in the form of an email and *in situ* photographs of the television, showing its model number sticker and university asset record number and barcode. This was sufficient to pursue its disciplinary concerns about why an item still on its campus asset register was in an employee's residence elsewhere.

[52] The potential unfairness to Mr Barry, in this instance, was that he was not given an opportunity to return the items voluntarily, until at least any legitimate claim he might have to them was considered. He, therefore, possibly experienced an unnecessary intrusion into his home and what he described, in his oral closing submissions to the Authority investigation meeting, as an opportunity to apologise for "the miscommunication" on whether he was permitted to take the television.

Limiting access to classes on campus

[53] Mr Barry complained that the ban on him going on to the campus, in effect from the evening of 4 August until 9 August, had “severely impacted” his studies. His own oral evidence to the Authority investigation did not support that description.

[54] Falling over a weekend, this five-day period included only three on which classes were held. Mr Barry said he had missed one compulsory class in that time. Mr Kirkham’s evidence showed he had acted promptly and fairly through the university’s legal and human resources channels to ensure Mr Barry was again permitted access to campus to continue his studies without interruption while the employment issues were addressed.

Failure to disclose some information

[55] A fair investigation, conducted prudently, will provide the employee under investigation with a copy of interview notes or statements given by other employees or witnesses about the matters under investigation. It is important the employee under investigation knows what has been said and by whom, so that employee can identify any reason the information given by those people might be incorrect or mistaken. It may also be important to know what questions were asked of those attending interviews or making statements because that may show some relevant aspect was omitted.

[56] The evidence of Mr Kirkham and Ms Lem to the Authority investigation showed the university had not honoured an undertaking given to Mr Barry at the outset of the process.

[57] In the letter of 4 August, drafted for Mr Kirkham’s signature by a human resources advisor who assisted earlier in the process, Mr Barry was promised he would be sent “all relevant information” before the disciplinary meeting. This did not happen. No notes of interviews with Mr Thornton, the installation supervisor and the other two security officers were sent to Mr Barry before the 20 September meeting. Instead, Mr Kirkham relied at that meeting on his own recall and handwritten notes to summarise those interviews for Mr Barry to then respond to or comment on during the meeting.

[58] Mr Barry was told during the 20 September meeting that the tag on the power supply unit confirmed it was owned by the university and recorded as being located in a particular room. Mr Kirkham did not tell him that a check of the university card

access system had shown Mr Barry had entered that room during work hours on two occasions, in late June and early July.

[59] It was not until 8 November that Mr Barry received a summary of that information in the investigation report provided to him then for comment.

[60] It also became apparent in the Authority's investigation that Mr Kirkham had not provided Mr Barry with some other information available to Mr Kirkham that formed part of the context he considered in drawing his disciplinary conclusions. One was an email from the Unleashed Space co-ordinator, on 1 September, advising of his own contact with Mr Barry when the television was stored there. Another was a further email from a Police officer. The Police officer's message, on 15 August, summarised a discussion he had with a barrister acting for Mr Barry about an account of events.

[61] The officer's email, even though only relaying what was a second-hand account through Mr Barry's barrister, was not inconsequential because Mr Kirkham's own witness statement indicated he had relied on it for a step in his investigation. Mr Barry was reported, through his barrister and then the Police officer, to have said he understood the equipment was "decommissioned" and took this to mean that it would be thrown away and the contractor was saying he could have it. The next day Mr Kirkham interviewed the contractor to find out his account of events.

An unreasonably long investigation

[62] There was no explanation given for why the formal investigation of an incident involving two items being removed from the campus without apparent authority took more than 15 weeks from beginning to end. It contrasted with the prompt action in getting a Police search warrant. Interviews with those who might have useful information about what had happened began in mid-August and were completed by mid-September. No reason was given for the more than four-week delay that followed from the 20 September disciplinary meeting until Mr Barry was sent the investigation report, with its preliminary conclusion proposing dismissal, on 8 November.

[63] Mr Barry's allegation that he was told the process might take two or three weeks when he was stood down, on pay, on 4 August was not really challenged.

[64] If there was evidence that he had expressed concern about the delay and pressed the university for progress, it could be said he was unfairly treated. While he may,

understandably, have been anxious about the potential outcome, a text message Mr Barry sent a former colleague some weeks into the investigation read: “I’m still currently on leave without pay hahaha its excel[lent]”. He continued to receive his full pay throughout the 15 weeks. Arguably, given the eventual outcome, a quicker process would have been to his disadvantage.

Alleged predetermination of outcome

[65] Mr Barry described Mr Kirkham’s view of what happened and the appropriate outcome as ‘presupposed’ from the outset. He relied on a comment he said Mr Kirkham made when escorting him off campus on the evening of 4 August. According to Mr Barry, Mr Kirkham said to him: “Your flatmate told us you nicked it”. In his oral evidence Mr Kirkham said he could not recall making that comment.

[66] Accepting Mr Kirkham did make that comment, it did no more than fairly identify the source of the information being acted on and the view expressed by the flatmate. It did not indicate Mr Kirkham’s own view of whether or not it was true.

[67] Other evidence disclosed that Mr Kirkham had subsequently focussed on what facts could be established about where the television and power supply unit had been, what the tags on them showed and what permission had or had not been given to remove those items. While he reached a firm view in the end, those were the appropriate steps for an inquiry of this type and did not show he had closed his mind to other possible explanations.

[68] Similarly, there was no evidence that it was inappropriate for Mr Kirkham to both investigate the concerns and make a final decision on the outcome, after meeting with Mr Barry in the initial disciplinary meeting and giving him the opportunity for further comment or meeting. Rather, absent some close connection with a person involved or some other conflict of interest, he was the appropriate person to carry out the inquiry as the relevant manager, provided he followed the necessary process or policies in doing so.

Conclusion on defects in process

[69] Reviewing the evidence disclosed some validity to Mr Barry’s concerns about how a Police search came to be conducted and whether all information available to Mr Kirkham had been properly disclosed to him.

[70] As noted earlier, not every defect will render a disciplinary process unfair. This is tested, to some extent, by considering what difference could have resulted from the counter-factual situation of the defect not having occurred.

[71] In Mr Barry's case this disclosed no significant factor that could, more likely than not, have changed the substantive outcome. When asked in the Authority investigation meeting about what difference might have resulted, Mr Barry accepted that Mr Kirkham had told him about the information gathered from interviews with Mr Thornton, the other contractor and the two security officers. Although he had not seen the written statements of those two officers during the disciplinary inquiry, he accepted there was nothing in them he would quibble with.

[72] This reflected the reality that there was no contest about the fact Mr Barry took the television. He accepted throughout he had. The contest was over what was or was not said between him and Mr Thornton. Resolution on that point required an assessment by Mr Kirkham that would not have substantively changed if Mr Barry had seen all the written material. Mr Barry's response and evidence about the allegations would likely have been the same. Mr Kirkham's decision on that response would also have been the same. The decisive issue was Mr Kirkham's substantive conclusion on who he chose to believe, not a defect in providing written copies in advance of all the material gathered.

[73] Similarly, assessing the facts in this case in their full context, the Police search did not result in Mr Barry being treated unfairly. It did not deprive him of property to which he held any proper right to have. The perhaps unnecessary intrusion into his home, if there was a prospect he might have returned the television and power supply unit voluntarily if asked, was not sufficient to find he was treated so unfairly that he had established a grievance of unjustified disadvantage.

[74] And, even if such defects were too lightly weighed, they nevertheless had to be balanced against the substance of the concerns raised with him and the conclusions reached by the university. In this case, the evidence favoured the university's conclusion that Mr Barry's conduct had gone beyond what could reasonably be accepted for an ongoing employment relationship.

A reasonable conclusion of serious misconduct

[75] In the collective agreement Mr Barry was employed under the phrase “serious misconduct” was defined as including theft, misappropriation and behaviour which leads to significant loss of trust and confidence.

[76] Misappropriation means to dishonestly or unfairly take for one’s own use.⁴

[77] As submitted by the university, their security guards must exercise sound judgement given the access they have to its buildings and assets in the course of their duties.

[78] Measured on the civil standard of the balance of probabilities, the evidence about Mr Kirkham’s inquiry showed he could have fairly concluded Mr Barry had neither sought nor been given authority to remove the television from its storage room and take it off campus for his own use. Having checked whatever objective facts could be ascertained about asset tags and room access, it was within the range of reasonable responses for Mr Kirkham to accept the account of Mr Thornton and others as more reliable than that of Mr Barry on that point.

[79] Another employer, because a range of responses is possible and permissible, may have been prepared to accept Mr Barry was merely mistaken or misguided in doing what he did.

[80] However, as a security guard with trusted access to its resources, it was also within the range of such responses for the university to expect Mr Barry not to act as he did without clear and express permission if he was to remove the university’s property from its campus. Rather he had misappropriated the items for his own use so a dismissal for serious misconduct was open to the university in those circumstances.

[81] In answering questions at the Authority investigation meeting Mr Barry gave two explanations which could have been relevant to this conclusion. He gave neither explanation during the university’s inquiry so they were not part of “all the circumstances at the time” against which the fairness and reasonableness of the employer’s actions is assessed.

⁴ Concise Oxford English Dictionary (OUP, 2011).

[82] Firstly, Mr Barry referred to an earlier instance where he was permitted to take some items off campus without following any formal process of approval. He said that while employed in the university's halls of residence, he had taken chairs and wood being thrown out by contractors who were renovating a dining room. The difference in that case, which Mr Barry acknowledged, was he said he had asked the contractors directly if he could take those items and was directly told he could. Even on his own evidence, Mr Barry had put no such direct question and got no such direct response from Mr Thornton or anyone else approving removal of the television. Accordingly, even if he had raised that example during Mr Kirkham's inquiry, it was an explanation that would likely have hindered rather than assisted his case.

[83] Secondly, Mr Barry said the power supply unit did not come from the lecture room identified on the tag and referred to by Mr Kirkham. He said it came from a bin in a university project space which was "open to everyone". He said other cords in that bin also still had university asset tags on them, but no one needed permission to take those cords. If that were so, he gave no reason for not having put forward that explanation during the disciplinary inquiry.

Outcome

[84] For the reasons given, Mr Barry had not established the university failed to act as a fair and reasonable employer could have done in investigating its concerns and deciding to dismiss him for serious misconduct. His application for a finding of a personal grievance is declined.

Costs

[85] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[86] If unable to do so, and an Authority determination on costs is needed, the university may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Mr Barry would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[87] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Robin Arthur
Member of the Employment Relations Authority

⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.