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## Heath v Auckland City Council (Auckland) [2007] NZERA 51 (26 February 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 49/07 File Number: 5070026

BETWEEN DAMON PETER HEATH

Applicant

AND AUCKLAND CITY COUNCIL

Respondent

Member of Authority: Representatives:

Determination:

Leon Robinson

Richard Harrison for Applicant Shan Wilson for Respondent

26 February 2007

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] The applicant Mr Damon Heath ("Mr Heath") applies for an investigation into the termination of his former employment as Marina Manager at the respondent Auckland City Council's ("the Council") Viaduct Harbour Marine Village. Mr Heath was dismissed from the employment on 25 October 2006. He was conditionally reinstated by order of the Authority dated 24 November 2006. This Determination deals with the substantive issue of whether his dismissal was unjustifiable.

[2] The Council's Group Manager Recreation and Community Services Mr Cameron Parr ("Mr Parr") wrote to Mr Heath in a letter dated 20 September 2006 instructing him to attend a disciplinary meeting. The Council's concerns were specified:-

*That you accepted "gifts" of considerable value without disclosing them to Auckland City*

*namely a number of boat cradles*

*That you sold that property, accepted the money and kept it for yourself*

*That you raised a purchase order with a supplier and then commissioned them to conduct work to cut up the boat cradles. This work was charged to Auckland City*

*That you raised a purchase order for hire equipment which was then used to dispose of goods for which you received personal gain*

*That you charged Auckland City customers for the removal of the boat cradles and then kept the money that you made from the sale of those cradles*

*That this may amount to unauthorised use or inappropriate use of funds or council resources which is listed in our code of conduct as serious misconduct*

[3] Mr Heath was dismissed on 25 October 2006 as confirmed by Mr Parr in a letter dated 27 October 2006. The Council's earlier six specified concerns were reduced to two grounds justifying Mr Heath's summary termination:-

*Given you believed the cradles were a gift to you, you did misuse Counsel resources by:*

*Arranging for AIMECS to dismantle the cradles under an Auckland City purchase order, so that Auckland City was invoiced for this work.*

*Using an Auckland City purchase order to hire the truck and trailer, which were used to dispose of the cradles, once they had been dismantled, again at Auckland City's expense.*

[4] The parties were unable to resolve the problem between them by mediation.

### **The facts**

[5] Mr Heath was initially employed by America's Cup Village Limited as Marina Manager on 1 July 1999. In November 1993, the Council took over management of the marina and renamed it Viaduct Harbour Marine Village. Mr Heath was employed as Marina Manager by the Council under the terms of a written individual employment agreement dated 22 October 2003.

[6] The Authority finds that although not known to Mr Heath, one of his work colleagues and a personal friend, was unhappy with Mr Heath. The friend was resentful of Mr Heath because he apparently had to work weekends while Mr Heath did not and because he observed Mr Heath driving a hire truck in July 2006 and concluded that Mr Heath was conducting dishonest activities, activities which they had both conducted together previously. This friend and colleague then conveyed these matters to the Council's Acting Manager Viaduct Marine Harbour Village Mr Craig Furlong ("Mr Furlong"). Mr Heath was not aware of his friend's communication to Mr Furlong. Mr Furlong does not disclose this aspect of matters in his prepared evidence to the Authority.

[7] Consequently, the Council's Recreation and Community Services (RACS), conveyed concern about Mr Heath's actions to the Council's Risk and Assurance Services. Mr Tim Shaw, an auditor ("Mr Shaw"), was tasked with enquiring into the situation.

[8] Mr Heath attended a meeting with Mr Shaw on 13 September 2006. Accompanying Mr Heath was his friend Mr Gustafson. Present for the Council was Mr Shaw, Mr Furlong and Council Human Resources advisor Ms Nina Ebbeling ("Ms Ebbeling"). At this meeting, Mr Heath was asked about two invoices to the Council, the first from a company of marine and industrial

engineers Aimecs Limited ("AIMECS") and the second from a company Hire Equipment Limited ("Hire Quip"). He was also asked about purchase orders associated with these invoices.

[9] Mr Heath explained that he had instructed AIMECS to cut up refuse boat cradles left at the marina and that he had removed the cut up scrap metal himself using the Hire Quip truck and trailer. He further explained that he had received money for the scrap metal which he used to pay for a breakfast for his work colleagues and to take his wife to dinner. Significantly, he explained the boat cradles were left to him by brokers as a gift or tip. He said he had advised AIMECS the bill was his personally. He said it was a mistake that the Council had been invoiced and that he would pay the invoice. Mr Shaw then asked why purchase orders had been raised. Mr Heath said they were general purchase orders. Mr Shaw reminded Mr Heath that gifts over \$75.00 could not be accepted.

[10] Mr Parr subsequently wrote to Mr Heath by the letter dated 20 September 2006 requesting Mr Heath to attend a formal disciplinary meeting to be held on 25 September 2006.

[11] Mr Shaw produced an audit report dated 26 September 2006. He concluded that Mr Heath should have accounted for the proceeds of the sale of the boat cradles scrap metal. He recommended that Mr Furlong review the related purchase orders and that Mr Heath recompense the Council the sum of \$310.00. This report was not provided to Mr Heath.

[12] The meeting scheduled for 25 September 2006 did not proceed but instead was postponed to 2 October 2006. Mr Heath was represented by his solicitor Mr Richard Harrison ("Mr Harrison"). Present for the Council were Ms Ebbeling, Mr Furlong, and Mr Parr.

[13] Mr Harrison later wrote to Mr Parr by letter dated 4 October 2006. Mr Harrison wrote:-

*Further to our meeting on 2 October 2006, I would make the following observations:*

1. *The practice of boat owners gifting the proceeds of sale of boat cradles to Damon has been in existence prior to Auckland City becoming his employer. This was something that occurred prior and was not hidden, Damon simply was continuing the practice and did not*

*understand it to be an issue.*

2. *2 That fact of whether or not this practice comes within the Council's gifting policy has been introduced after the event which is why Damon has not turned his mind as to whether or not the practice came within the policy.*

*3 In terms of the application of the gifting policy to the practice, I would make the following comments, some of which I raised during the meeting:*

*a The gift in this case is whatever price Damon can recover from the sale of the boat cradles as scrap metal, a value which to date has not exceeded \$30.00.*

*b The ownership of the boat cradle remains with the customer who in this scenario would be responsible (and accept) the cost of removal.*

*c In appropriate situations, Damon made the call as to when to charge the customer for the removal of their cradles both in terms of hours and hireage value. The invoices in this case covered this cost and Auckland City made a profit.*

*d The cost of breaking the cradles down in order to transport them is probably one which should also be met by the client, nevertheless it was Damon's intention that the cost be met out of funds obtained from the scrap metal merchant. It is accepted that the invoice in question was in dispute and had not been passed for payment by Damon. Auckland City was not being required to meet the cost of this exercise.*

**Mr Harrison is critical of Council and makes submissions noting the Council did not respond.**

[14] On 5 or 6 October 2006 Mr Parr, Mr Furlong and Ms Ebbeling met to discuss the situation. They resolved that Mr Furlong would undertake further investigations arising out of Mr Heath's responses.

[15] Mr Heath commenced annual leave from 5 October 2006 and intended returning on 24 October 2006.

[16] Mr Furlong spoke with Mr Arthur Irvine of AIMECS ("Mr Irvine") and also made other enquiries. He prepared a memorandum setting out his findings which was provided to Mr Heath.

[17] A further disciplinary meeting was held on 11 October 2006 with Mr Heath, Mr Harrison, Ms Katherine Burson ("Ms Burson"), Mr Parr and Mr Furlong. Mr Heath presented a written response to Mr Furlong's memorandum which Mr Harrison elaborated on. Mr Harrison also expressed concern about the process of the investigation and asked for "some balance in the process". He invited the Council to agree a fair way to question and obtain responses from relevant persons. Mr Harrison and Mr Heath stated they wished to make their own further enquiries.

[18] Mr Harrison held a without prejudice discussion with the Council representatives. The meeting ended on an understanding that Ms Burson would later advise how the investigation would

proceed. Mr Harrison was to conduct further enquiries on Mr Heath's behalf. Mr Heath resumed his annual leave.

[19] On 20 October 2006 Ms Burson emailed Mr Harrison to confirm that a further meeting was to be held on 25 October 2006 the purpose of which was to advise Mr Heath of the "outcome of this process".

[20] At a meeting held at 3.15 pm on 25 October 2006 Mr Heath was advised he was summarily dismissed.

The merits

[21] The [Employment Relations Act 2000](#) prescribes a statutory test of justification which is instructive for the Authority. So what were Mr Heath's actions which led to his dismissal? I proceed to review them now.

[22] It is not in dispute that Mr Heath had retained funds of about \$300.00 being the proceeds of sale of scrap metal from dismantled boat cradles. He said he had shouted his colleagues to breakfast and taken his wife to dinner. He maintained in the disciplinary investigation that the boat cradles were given to him by the owners or brokers, as a tip or a gift to him personally, although his lawyer Mr Harrison had invited the Council to consider an alternative view of this aspect of matters.

[23] The Council gave Mr Heath the benefit of the doubt accepting that he believed the boat cradles had been left as a personal gift to him even though some clients had considered they had left the cradles for the marina and some had been charged for removal. I proceed on this basis and return to this issue later.

*Arranging for AIMECS to dismantle the cradles under an Auckland City purchase order, so that Auckland City was invoiced for this work.*

[24] This allegation relates to AIMECS invoice Number 10003 charged to the Council as the

Viaduct Harbour Marine Village and posted on 2 August 2006 to the Council.

[25] I find that Council was justified in finding that on 14 July 2006, Mr Heath had asked Mr Arthur who was engaged to do other work, to cut up boat cradles left at the marina. I will refer to this work hereafter as "cradle cutting".

[26] Mr Heath's affidavit to the Authority explains his instruction to Mr Irvine thus:-

*/ had arranged for Art Irvine of AIMECS Engineering to do some work on the travel lift at this time. While he was on site **I took him across to the cradles and asked whether he would do a job for me** and cut them up so that I could fit them on a trailer to take them away. This was a spur of the moment request, but as I could not get hold of Total Marine's truck and no one else had turned up to take the cradles away, I thought this was the next best option. **Art said this was not problem and he did the job.** I had estimated the job would take Art about 4 hours and thought I would recover this from the scrap metal money.*

The emphasis is mine.

[27] In the meeting with Mr Shaw on 13 September 2006, Mr Heath stated that the subsequent invoice for this work was his (personally) and that AIMECS had made a mistake invoicing this work to the Council. He stated Mr Irvine had forgotten and put the invoice through the council's invoice system. Mr Heath said he was happy to pay for this work. The AIMECS invoice referred to a Council purchase order number. Mr Heath explained in the meeting with Mr Shaw, that the purchase order was a general purchase order, authorising purchases with the creditor for general and ongoing maintenance and welding on cradles and travel lift. Mr Heath explained:-

*AIMECS - my bill - for Damon to pay. Not been on their goods receipt. They were going to issue me another bill. Their mistake. I have regarded the transcribed version as unreliable. [28] Mr Shaw then asked Mr Heath why he had raised a purchase order, to which Mr Heath said:-*

*They do maintenance and welding cradles. General Purchase order.*

And materially when Mr Shaw said "covered by PO raised day before " Mr Heath replied:-

*Any work they do is on the order number told them to cut them up. He has forgotten and put them through system. Happy to pay for work being done, not for the full amount.*

[29] Mr Shaw was wrong to say the Council had paid the invoice and Mr Heath subsequently paid it himself. The Council did not continue to pursue an initial allegation that Mr Heath had raised a purchase order specifically for the cradle cutting. Mr Heath had not done so. The cradle cutting work was authorised under a general purchase order for the creditor, one which had been regenerated for the new financial year replicating the order for the previous year.

[30] In the meeting held on 2 October 2006, Mr Heath explained:-

*Reason for raising purchase order - to get work done on travel lift. At same time spoke(sic) from Art from AIMECS (shows photo). Put in piece underneath travel lift straps underneath to stop resting. Travel lift parked near where cradles were lying. At that time asked Art to cut up cradles. **Said it was my job and I'd sort that out with you. Art very nice fellow, but his hearing is not the best.** Never takes notes. Invoice came in across Kate's desk. Kate handed it to me -I said it was mine and far too expensive. Then saw Neville from AIMECS. Spoke to Art when he got back from leave. Neville to come back with revised invoice. Didn 't chase it longer it took - better it was for me. Person there for 4 hrs (no 7). Part of payment from scrap steel was to pay off invoice. (About a week after invoice came in). That is why I haven't signed off.*

**The emphasis is mine.**

[31] Mr Furlong had spoken with Mr Irvine. He reported that enquiry as follows in the meeting held on 2 October 2006:-

*Spoke to Art. Said Damon had rung disputing hours. Asked Art who he thought bill was for. He said VHMV. Asked if he had ever asked if bill had been asked for it to be made out to him. He said no. 14th sept this morning went to see them. Still made out to VHMV.*

**[32] Mr Furlong made further enquiries of Mr Irvine. In his memorandum of 7 October 2006 he reported of that further enquiry:-**

*Neville at AIMECS can recall Damon asking him to check with Art Irvine, supervisor, AIMECS Engineering the number of labour hours on the invoice as he was disputing that the work took as long as what had been invoiced. Neville confirmed that Damon had not asked him to change the name on the invoice from VHMV to Damon Heath.*

**[33] At the second disciplinary meeting held on 11 October 2006, Mr Heath provided a written response to Mr Furlong's memo. In relation to the cradle cutting issue he stated:-**

*AIMECS*

*Damon did not seek a change in the name to the invoice at the time of questioning the labour hours, this would have been done when presenting the cheque for payment. After the meeting with the auditor, Damon asked Art Irvine to also change the name on the invoice. If this is to be an issue, there needs to be the opportunity for Damon to take with Art Irvine.*

[34] Mr Heath told the Council he had always intended to pay for the work AIMECS carried out cradle cutting. The Council was wrong to state in its letter that Mr Heath had received the AIMECS invoice in July - it had not been posted until 2 August. It found that Mr Heath had taken no steps to ask AIMECS to change the invoice into his name even though he had approached it disputing the

hours that were charged. The Council concluded Mr Heath never intended the invoice be charged to him personally.

[35] I find that it was reasonable for the Council to conclude that Mr Heath had never asked AIMECS subsequently to amend the invoice and charge it to him personally. Consequently, it was reasonable for the Council, on the evidence it had gathered, to reject Mr Heath's assertion he had instructed AIMECS to charge him personally for this work.

[36] Mr Heath never denied authorising the cradle cutting work under an Auckland City purchase order. There was no evidence that he specifically raised a particular purchase order for this expenditure, however, there was evidence that he had allowed a general purchase order to authorise this work. It was not however, work which should have been authorised under a Council purchase order.

[37] I find that it was reasonable for the Council to conclude that Mr Heath had directed Mr Irvine to perform work under the authority of a Council purchase order (PO4500138410). That cradle cutting work was not authorised by the Council but rather, was work which Mr Heath instructed for his own benefit. Mr Heath had no authority to permit this work to be carried out pursuant to a Council purchase order. It was not Council work. It was work which Mr Heath directed in his own interest.

[38] In the Authority's investigation, Mr Heath continued to maintain the AIMECS invoice was "my bill". He says he told Kate Parkes this when the invoice was received. That position establishes for the Authority quite convincingly, that Mr Heath accepts the work the subject of the AIMECS invoice was undertaken for his own benefit. This is what I mean when I later refer to Mr Heath's own interests.

[39] As well, the Authority notes Mr Heath had no difficulty whatsoever that a Council purchase order number was used for this work. He regarded that situation as inconsequential because of his stated intention that he would have paid for the invoice. But it is not inconsequential. A purchase order is a written authorisation for a supplier to supply product or services at a specified price. The cradle cutting work was not work which was authorised by the Council. It was work which was for Mr Heath's own purposes. It should not have been authorised by a Council purchase order. Secondly, the purchase order creates a legally binding contract once the supplier accepts it. The

other party to the contract was not Mr Heath, but rather the Council. The Council became liable for the work that was carried out. The creditor had a legal claim against the Council and not Mr Heath. That is not inconsequential. These are the reasons why the use of a purchase order for the cradle cutting work undertaken for Mr Heath's personal gain was inappropriate.

[40] Equally, it appears to the Authority Mr Heath similarly regarded the invoicing of the cradle cutting work to the Council was also inconsequential as long as the invoice was eventually paid by him. I do not agree. An invoice to the Council gives rise to a contingent liability to pay Goods and Services Tax. Also, any such invoice is recorded in the Council's accounting system and distorts the accuracy of those accounts.

[41] It must follow then that Mr Heath's use of a council purchase order in these circumstances, was contrary to his employer's interests. In addition, Mr Heath's actions were to advance his own interests before those of his employer. Lawyers call this a breach of his duty of fidelity - the duty to be faithful to one's employer, to work faithfully and devotedly in the employer's interests.

[42] These duties ought to be readily understood by those employees who hold positions of trust or responsibility. Mr Heath was employed by the Council as a manager. He held a position of responsibility and the Council was entitled to expect better of him.

[43] Mr Heath's actions were to commission the cradle cutting work using a Council purchase order as authorisation. The work was not authorised for it was work performed for Mr Heath's own personal gain. Mr Heath furthered his own interests

before those of his employer.

[44] For all these reasons, I find the Council was justified in concluding Mr Heath's action constituted serious misconduct justifying summary termination.

*Using an Auckland City purchase order to hire the truck and trailer, which were used to dispose of the cradles, once they had been dismantled, again at Auckland City's expense.*

[45] This allegation relates to invoice Numbers FAN059141 \$43.74 and FAN059326 \$82.07

charged to the Council as the Viaduct Harbour Marine Village and invoiced on 14 July and 22 July 2006 respectively.

[46] I find that Council was justified in finding that on 14 July 2006 and 22 July 2006 Mr Heath had transported cut up cradles to a scrap metal dealer using Hirequip Limited truck and trailer. These invoices were paid by the Council and authorised by Mr Heath.

[47] Mr Heath's affidavit to the Authority explains this expenditure as follows:-

30. *30 Within a few days of Art cutting up the cradles, I ordered a trailer and loaded it up. The purpose of hiring this trailer was two-fold, one to remove some of the cut up cradles (it wasn't big enough for the entire job) as well as calling in on Craig Ramsdale of Arco Limited. Craig was making us tripods, we had ordered about 20. Craig had promised me a prototype to try out which I had thought I could bring back while I had the trailer. As it turns out, the prototype was not ready so I returned the trailer which had been hired for half a day.*
31. *31 In order to remove the remainder of the cut up cradles, I hired a truck for Saturday, 22 July 2006. I loaded the remainder of the cradles in my time and took them to the scrap metal merchant. This then cleared the site of the cradles which was the purpose of the exercise. The total value of the scrap metal came to \$310.00. I used this money to buy breakfast for the team as I had on the earlier occasion, Chris Lea and Paul Jeffrey came along. I also took my wife to dinner. I had thought that the monies received from the scrap metal would cover both AIMECS bill and cost of both meals. As it turned out, the Aimecs bill (which I paid) came out at \$350.00, leaving a shortfall of \$40.00, the breakfast and dinner being at my cost. At the end of the day, this exercise to remove the cradles was a cost to me.*

The emphasis is mine. [48] In the meeting with Mr Shaw on 13 September 2006, Mr Heath stated:-

*Intention to get tripods from ACRO Limited. Loaded trailer with cut up cradles, took them to a scrap dealer. Then went to ACRO. Parked car with trailer to get tripods. He said he had only made 1 prototype. Do two jobs with 1 trip (look at tripods and drop off scrap metal)*

[49] He confirmed he took the cut up cradles to a scrap dealer and hired the trailer for half a day. He confirmed too he had hired the truck on 22 July to remove the scrap metal out of the yard as well.

[50] At the meeting on 2 October 2006, Mr Heath was asked why the Council had paid for the trailer. His lawyer confirmed he and Mr Heath were comfortable with the response they had given in the 13 September meeting with Mr Shaw. Mr Heath went on to explain the use of a purchase order to authorise this expenditure as follows:-

*PO for hirequip was a standard order eg water blaster. Didn't specifically raise the PO for this job. Ended up on that PO because it is the order we have with hirequip. Comes in close in the time of this as at 30 June all order numbers end. New financial year, raise PO's as needed.*

*Hired trailer to do 2 jobs, one to put pressure on Acro Ltd to see I had arrived with trailer. On the way out there I took the scrap, to get the tripods on the way back. I am always trying to put 2 or 3 things together. Took the trailer out at 9.30 back at 12.30. If I lived out that way and needed to see them, and had left lunch at home I would have got lunch on the way. Had Acro on phone 5-6 times in 9 months.*

[51] The Council found that Mr Heath had never telephoned ACROW Limited to ascertain whether the tripods were ready, and that he knew the supplier was behind time with the work. Because of that, it did not accept his stated purpose was genuine. It concluded that it was unacceptable for Mr Heath to have incurred this expenditure for his own personal business.

[52] Mr Heath never denied authorising the truck and trailer hireage under an Auckland City purchase order. There was no evidence that he specifically raised a particular purchase order for this expenditure, however, there was evidence that he had allowed a general purchase order to authorise this work. It was not however, work which should have been authorised

under a Council purchase order. The invoices generated against these purchase orders were paid by the Council as approved by Mr Heath.

[53] I find that it was reasonable for the Council to conclude that Mr Heath had hired a truck and trailer under the authority of a Council purchase order (PO4500138804). That hireage was not authorised by the Council but rather, was expenditure which Mr Heath incurred for his own benefit.

[54] It must follow then that Mr Heath's use of a council purchase order in these circumstances, was contrary to his employer's interests. In addition, Mr Heath's actions were to advance his own interests before those of his employer. Mr Heath was employed by the Council as a manager and the Council was entitled to expect better of him.

[55] Again, I find this is a further instance where the Council was justified in concluding Mr Heath's action constituted serious misconduct justifying summary termination.

### **The determination**

[56] The Authority reviews the Council's decision to ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The statutory test then obliges the Authority to separate out the employer's actions for evaluation against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[57] After its disciplinary process, the Council concluded that summary dismissal was appropriate as it considered Mr Heath's *actions had seriously breached its trust and confidence* in him. Such an allegation must always be objectively sustainable. The critical question is whether the employee's conduct is compatible with the faithful discharge of their duty to the employer, not on their general level of competence or nous.

[58] Mr Harrison does an admirable job for Mr Heath. I have considered the submissions advanced and deal with those that are most salient. Firstly, it is submitted that the meeting with Mr Shaw was carried out under false pretences and Mr Heath was prejudiced by not being properly briefed for the purpose of this meeting. I note that no objection was raised subsequent to this particular meeting. I discern no element of unfairness arising out of the fact of this session. It was a fact finding mission and the starting point for the Council. I do not agree with the submission that Mr Heath communicated to Mr Shaw the AIMECS invoice was not part of the purchase order for AIMECS. I agree however, that the impetus for the auditor's involvement followed the disclosure to Mr Furlong, which was not disclosed to Mr Heath. The Council ought to have told Mr Heath what his colleague and friend had said about him.

[59] I agree with Mr Harrison's concerns about the Council's transcribed notes. I have dealt with them very cautiously accordingly. Mr Harrison's submissions on this aspect are quite insightful. I am not persuaded however, having heard from Ms Ebbeling, that there is anything nefarious arising from the variances disclosed by them. I note that Mr Harrison is quite correct to note the changed responses from the Council on the issue of Mr Heath's honesty. I also note the submission made about the AIMECS invoice not being paid and presented to Mr Heath as paid by Council. As a result of these submission and others, I have concluded the transcribed notes are unreliable and I have preferred the handwritten responses recorded as evidence of Mr Heath's explanations. But it is the evidence relating to the use of purchase orders and the circumstances surrounding the incurrence of expenditure which I am mostly concerned with.

[60] Mr Harrison criticises the Council for failing to respond to his advice of 4 October 2006. The submission made now is Mr Heath was not given the boat cradles in a legal sense, but he could get rid of them for brokers without having to go back and obtain their permission to do so. It is submitted that the boat cradles could not have passed to Mr Heath as his personal property and consequently, it may well have been appropriate for Mr Heath to have made arrangements for their

removal by using purchase orders and then invoicing clients. Mr Harrison is critical because he did not get an opportunity to put this position as a result of the Council's failure to respond to his written communication of it. Mr Harrison says the Council's finding giving Mr Heath the benefit of the doubt, was not beneficial at all the Mr Heath.

[61] I am unable to accept the submission. Mr Heath maintained the AIMECS bill was "my bill". As I have earlier said, that establishes for the Authority, Mr Heath's personal interest in the matter and evidences the motivation, purpose and intention behind his actions. Whether or not he had the best title or claim or interest in the refuse cradles, there could be no doubt he was acting in his own interests and he believed he was. Mr Heath has never resiled from that. For that reason, I reject Mr Harrison's submission but I acknowledge the Council ought to have expressly communicated its rejection of it as well.

[62] Mr Heath is critical of the Council and says that he was not aware that he would be advised a decision on 25 October 2006 and therefore unprepared for it. He says he was desirous of further enquiry. I am satisfied he was well aware the Council would give its decision at the time he was dismissed. I am satisfied too, that the Council had made sufficient enquiries

in relation to the matters for which it ultimately dismissed. I am satisfied that the Council carried out a full and fair investigation which disclosed conduct justifying summary dismissal.

[63] I must now separate out the Council's decision to dismiss and evaluate it against the specified objective standard of what a fair and reasonable employer would have done in these circumstances. I take into account Mr Heath's lengthy service and his personal circumstances. I also take into account the Council's standing as steward of public funds and the necessity for it to repose a considerable degree of confidence and trust in its managers.

[64] Standing back and assessing matters objectively from the perspective of a fair and reasonable employer in these prevailing circumstances, I conclude that the Council's decision to dismiss Mr Heath was what a fair and reasonable employer would have done.

[65] As for the submissions relating to disparity, I do not consider the Council is precluded from its decision by virtue of matters which have not been the subject of prior disciplinary action. The instances referred to by Mr Harrison have never been confronted by the Council and therefore, not relevant in a disparity argument as instances of historical disparity.

### **The resolution**

**[66] I find that Mr Heath was not unjustifiably dismissed and he does not have a personal grievance. There will be no formal orders by the Authority. The orders made by the Authority in the determination of 24 November 2006 are now discharged.**

### **Costs**

[67] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Wilson is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Harrison is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

### **Recommendation**

[68] The Authority recommends that Auckland City Council review and revise its policies relating to gifts and tips.

Leon Robinson

**Member of Employment Relations Authority**