

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 451  
5414228**

BETWEEN JACK LEMON  
Applicant

AND IDEA SERVICES LIMITED  
NORTHLAND  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Punshon, Counsel for Applicant  
Paul McBride, Counsel for Respondent

Investigation Meeting: 29 & 30 August 2013 at Auckland

Submissions received: 30 August 2013 from Applicant and from Respondent

Determination: 1 October 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Jack Lemon, claims that he was unjustifiably dismissed by the Respondent, Idea Services Limited Northland (Idea Services) on 7 February 2013 following an allegation of theft made by Idea Services.

[2] Idea Services denies that Mr Lemon was unjustifiably dismissed, and claims that he was justifiably dismissed after a full and fair investigation.

**Issues**

[3] The issue for determination is whether or not Mr Lemon was unjustifiably dismissed by Idea Services.

**Background Facts**

[4] Idea Services is a charity carrying out the service delivery function for people with an intellectual disability that was previously carried out by IHC. The support offered by Idea

Services is provided in various ways in the community, including supporting service users in their own home, in Idea Services-run residential facilities, and by providing daytime vocational opportunities for service users.

[5] Idea Services employs Community Support Workers who provide hands-on support to people with an intellectual disability. Mr Lemon commenced casual employment with Idea Services on 20 February 2009 as a Community Support Worker, Level 1, and subsequently was appointed to a permanent position.

[6] At the time of his dismissal Mr Lemon was a Community Support Worker, Level 3, based at the Idea Services day centre at Moerewa (the Day Base). The Day Base provided services to service users on a non-residential basis, and whilst service users were welcome to bring their own food to the Day Base and prepare their lunch there, no meals were provided by Idea Services other than on special occasions.

[7] Mr Lemon said that on 21 November 2012 he, together with the service users for whom he cared at the Day Base, attended a barbeque in Kaitaia at which representatives of the Midway in Northland Day Services Trust (MINDS Trust) were also present.

[8] Mr Lemon explained that at the end of the barbeque he had been approached by Ms Elisabeth Langstone, the Co-ordinator of MINDS Trust, and told that he could take home for his own use a bag of sausages which had been donated for the barbeque by MINDS Trust. Mr Lemon explained that he had taken the sausages back to the Day Base and put them in the freezer located there for storage before taking them home.

*29 November 2012 Meeting*

[9] A Vocational Team Meeting had been held at the Day Base on 29 November 2012 chaired by Ms Jan Higgins, Community Support Worker, Level 4, who also took the minutes of the meeting, which had been attended by Mr Lemon, Ms Betty Lovatt, a Community Support Worker who worked with Mr Lemon at the Day Base, and Ms Karen Taylor, the Community Services Manager with responsibility for Idea Services vocational services in Northland.

[10] Ms Athena Kamlade, Community Support Worker, Level 5, was also in part-time attendance at the meeting, because she had to leave it at various times to attend to other matters.

[11] Ms Higgins said that she and Ms Kamlade had responsibility for purchasing the provisions for the Christmas party barbeque to be held for the service users on 18 December 2012. During the course of the meeting Ms Higgins said that Mr Lemon had stated that

MINDS Trust had donated some sausages for the Christmas party barbeque, and there was therefore no need to purchase any for the forthcoming Christmas party barbeque. In the minutes of the meeting Ms Higgins had recorded:

***Christmas party***

*Meeting agreed to hold the party on 18 December. Jack and Betty to use balance from Cooking Programme to contribute towards Christmas gifts for service users. Karen to provide a cheque for provisions next week. Jan reminded the meeting that Minds Trust had given them sausages for the party too.*

[12] Ms Taylor said that Mr Lemon had reminded her that the Day Base required a barbeque to cook the sausages and this had been recorded in the meeting minutes: *“Jack reminded Karen that they needed a bbq to cook sausages. Jack and Betty to send Karen two quotes ASAP as this is a health and safety issue.”*

[13] Ms Higgins said that Mr Lemon had told her that he would show her the sausages following the meeting, and after the meeting he had taken herself and Ms Kamlade to the Day Base freezer and shown them the sausages. Ms Lovatt had also been present.

[14] Ms Higgins explained that the sausages had been on the top shelf of the freezer and that there were approximately 40 Sausages. Ms Kamlade confirmed that the sausages were at the top of the freezer, and that it was a large bag.

[15] Mr Lemon said that he had said at the Vocational Team Meeting that the sausages had been given to him personally, and that he had raised the issue of the need to purchase a barbeque as the Day Base did not have one, that it would be needed to cook sausages at the Christmas party barbeque, and that not having an alternative cooking system was a health and safety issue.

[16] Mr Lemon denied having shown Ms Higgins and Ms Kamlade sausages in the freezer at the Day Base.

[17] On 6 December 2012 Mr Lemon had been issued with a First Written Warning for misconduct on or around September 2012 in respect of a number of allegations against him, one of which concerned the use of service user funds for private expenses. The warning was valid for 6 months.

*12 December 2012*

[18] Ms Higgins said she and Ms Kamlade were at the Day Base on 12 December 2012 delivering the groceries for the service users Christmas party barbeque, and as they were putting the items to go in the freezer, they had both noticed that the sausages were not there.

[19] Ms Kamlade said she had asked Ms Lovatt where the sausages had gone, and Ms Lovatt had explained that as there had not been enough room in the freezer for the milk when they had done the Day Base shopping, Mr Lemon had taken the sausages home to his freezer.

[20] As Mr Lemon was absent on sick leave, Ms Kamlade said she had asked Ms Lovatt to contact him and tell him to ensure that the sausages were brought back to the Day Base in time for the service users Christmas party barbeque on 18 December 2012, and Ms Lovatt had assured her that she would do so.

[21] Mr Lemon said that he had become concerned about the situation in respect of the sausages and so he had telephoned Ms Langstone, and asked her to confirm that the sausages had been given by her to him personally, which she had done.

*18 December 2012*

[22] On 18 December 2012 Ms Higgins said that when she and Ms Kamlade had arrived at the Day Base for the Christmas party barbeque, Ms Lovatt had advised them that she had to go to Pak'n'Save to get some sausages. When they had asked why Mr Lemon had not returned the sausages, Ms Lovatt had just replied that she was going to buy some.

[23] Mr Lemon said that he had telephoned Ms Lovatt on 18 December 2012 and asked her to purchase another bag of sausages to replace the ones he had taken home, as he was of the opinion that he would be accused of stealing the sausages from Idea Services.

[24] Ms Higgins said that there were representatives from the MINDS Trust at the Christmas party barbeque, and she had asked Ms Langstone about the sausages she had given at the previous event. At the Investigation Meeting Ms Higgins said that Ms Langstone had told her that she had given sausages to Mr Lemon for the next barbeque and that it was up to him as to what he did with the sausages.

[25] Ms Kamlade said she had overheard the conversation between Ms Higgins and Ms Langstone; however she had not heard Ms Langstone tell Ms Higgins that it was up to Mr Lemon what he did with the sausages.

[26] During the Investigation Meeting Ms Langstone said that she had no recollection of having a conversation about the sausages on 18 December 2012, but if she had done so, she would have said that the sausages were given to Mr Lemon for his own use.

[27] Ms Kamlade said that as she believed on 18 December 2012, the day of the Christmas party barbeque, that it appeared that Mr Lemon had taken sausages that were not his, she had contacted Ms Taylor, who had asked her to fill in an incident report.

[28] On the incident report completed by Ms Kamlade on 19 December 2012 she had written:

*Jack showed me some sausages in freezer that he said Liz from Minds trust had given him. Called to ask what meat was needed for BBQ and was told sausages istk etc. Asked about sausages and was told by Betty that they were Jacks and he'd taken them home. Told Jack to drop them off to day base. Spoke to Liz who informed me that the sausages where (sic) given to the people at day base for their next bbq.*

[29] Ms Taylor stated that on 19 December 2012 Ms Lovatt had given her a receipt in the amount of \$18.00 dated 18 December 2012 in respect of sausages, which Ms Lovatt said had been purchased to replace the sausages Mr Lemon had taken home.

[30] Ms Taylor had asked Ms Lovatt why Mr Lemon had taken the sausages home and Ms Lovatt had responded that there had been no room in the Day Base freezer and so Mr Lemon had taken them home. Ms Lovatt had further explained that in so doing, the sausages had rolled around in the back of Mr Lemon's car and he had had to replace them for health and safety reasons.

#### *Investigation*

[31] Ms Taylor said that after she had received the incident report from Ms Kamlade she had consulted with her then Area Manager, Ms Linda Barrie, who had agreed with her that an investigation was required. However due to the impending Christmas break and Mr Lemon's existing leave, the investigation could not commence until the following January.

[32] Ms Taylor said she had commenced her investigation by writing to Mr Lemon on 23 January 2012 asking him to attend a 'Please explain' meeting on 31 January 2013. The letter stated that: *"It is alleged that Minds Trust gave the service users a pack of sausages to cook at the end of year barbeque on 18 December and you took these sausages home for private use."*

[33] The letter advised Mr Lemon that the allegation was serious, and in the event that serious misconduct was ascertained, dismissal was a possibility. Mr Lemon was also advised of his right to have a representative at the meeting.

[34] Ms Taylor said that she had been contacted by Ms Vivian Espinosa, Organiser for the Service and Food Workers' Union Nga Ringa Tota Inc (SFWU) who was acting as Mr Lemon's representative and had met with her on 30 January 2013 to discuss the 'Please explain' meeting and to provide her with all the relevant information for the meeting.

[35] Ms Taylor said that Ms Espinosa had wanted to postpone the meeting and she had agreed to this; however Ms Espinosa had telephoned her later that day to advise her that Mr Lemon had wanted to proceed with the meeting the following day. Ms Taylor said that Ms Espinosa had also told her that she was concerned for her (Ms Taylor's) safety as Mr Lemon was very angry.

[36] Ms Taylor said that in accordance with advice received from Mr Carl Netzler who had been appointed as the Area Manager for the Northland area, and Ms Helen van Druten, the Idea Services HR Advisor, she had been accompanied by a male colleague, Mr Brendon Goodley, at the meeting.

[37] Mr Lemon confirmed he had been happy for the meeting to proceed without a SFWU representative present, and he had attended the meeting accompanied by Ms Langstone and Ms Huia Peita, a Tutor with MINDS Trust, as his support people.

*Meeting on 31 January 2013*

[38] Ms Taylor had commenced the meeting held on 31 January 2013 by referring to the incident report and asking Mr Lemon about the sausages which Ms Kamlade had reported as being missing from the Day Base freezer.

[39] In response, Mr Lemon had advised that Ms Langstone had given him the sausages. When questioned, Ms Langstone had confirmed that that was correct.

[40] Ms Taylor said she had then asked Mr Lemon a number of questions about the sausages, in particular:

- (i) whether these had been the same sausages as had been discussed at the Vocational Team Meeting held on 29 November 2012. Mr Lemon had replied that he did not know and that, contrary to what Ms Higgins and Ms Kamlade asserted, he had not shown the sausages to them as being for the service users' Christmas party barbeque;
- (ii) whether these had been the same sausages which Ms Lovatt had said he needed to take home as the freezer was full, and which had needed to be

replaced. Mr Lemon had replied that he did not know, and he should have Ms Lovatt in the meeting with him;

- (iii) why Mr Lemon had needed to take them to his home which was 34 kms away when there would have been space for them in the freezers at one of two other nearby sites in Kaitaia. Mr Lemon had made no comment;
- (iv) why Ms Lovatt had replaced the sausages for him. Mr Lemon had replied that the sausages were his; and
- (v) why Mr Lemon had left the sausages in the Day Base freezer if they were his. Ms Langstone had commented that he may have forgotten them.

[41] Ms Taylor said she had also asked Ms Langstone why she had changed her comment that the sausages were for the service users to eat at the Christmas party barbeque as the MINDS Trust contribution, to which Ms Langstone replied that she may have given mixed messages to Ms Higgins and Ms Kamlade on 18 December 2012.

[42] At the Investigation Meeting Ms Langstone disagreed and said she had not told Ms Taylor that she may have given mixed messages, but rather that 'mixed messages were out there', and that she had maintained that she had given the sausages to Mr Lemon for his personal use.

[43] During the meeting, Ms Langstone and Ms Peita had also told Ms Taylor that the service users were given plenty of food for the Christmas party barbeque and therefore she had given the sausages had given to Mr Lemon for his personal use.

[44] Mr Peita said that she had been present on 21 November 2012 at the barbeque held on 21 November 2012 when Ms Langstone had given Mr Lemon the sausages for his own use; however she had not told Ms Taylor this at the meeting on 31 January 2013.

[45] Ms Peita explained the reason for this as being attributable to the fact that she had not been allowed by Ms Taylor to speak at the meeting, and that she had had to control Mr Lemon who was very agitated and whom she was concerned might have assaulted Ms Taylor.

[46] Ms Langstone and Ms Peita both said that they had not been allowed to speak during the meeting on 31 January 2013 and that they had been told to 'shut up' at one stage by Ms Taylor.

[47] Ms Taylor denied that she had told Ms Langstone and Ms Peita to 'shut up', but explained that at one stage during the meeting Ms Peita had tried to discuss Mr Lemon's performance and she had advised that the purpose of the meeting was to ask Mr Lemon for his explanation as regards the sausages complaint as outlined on the incident report form received from Ms Kamlade.

[48] Ms Taylor, who said that she had been nervous during the meeting, further explained that she had prepared a number of questions to ask Mr Lemon and she had kept to these questions.

[49] Mr Goodley confirmed Ms Taylor's evidence that she had not told Ms Langstone and Ms Peita to 'shut up', and said that she had behaved in a professional manner throughout what had been a 'tense' meeting.

[50] Ms Taylor said that she had asked Mr Lemon if he would like to have EAP during the meeting, however he had declined.

[51] Ms Taylor said the meeting had concluded with Ms Langstone asking Mr Lemon if he had been happy with the way in which the meeting had been run, and he had confirmed that he had been.

[52] Ms Taylor again offered Mr Lemon EAP, which he had declined again, and she had discussed a further meeting to take place on 7 February 2013 after she had had time to consider what had been discussed and the next steps to be taken in the process.

#### *Subsequent Events*

[53] Following the meeting Ms Taylor said she had:

- reviewed the minutes of the Vocational Team Meeting held on 29 November 2012;
- questioned Ms Higgins and Ms Kamlade about whether or not Mr Lemon had shown them the sausages in the freezer, and whether Mr Lemon had said they were from MINDS Trust and provided for the service users, and they had confirmed this was the case; and
- confirmed with Mr Goodley that the minutes he had produced were a true record of the meeting held on 31 January 2013, and had couriered minutes of the meeting and a letter confirming the next meeting to be held on 7 February 2013 to Mr Lemon.

[54] Ms Taylor said she had also discussed the meeting and her thoughts on the matter with Mr Netzler, who had agreed that it was a situation in which she could consider dismissal.

[55] Mr Lemon said that he had believed the minutes of the meeting held on 31 January 2013 to have been inaccurate and he therefore contacted Mr Netzler on 4 February 2013.

[56] Mr Netzler confirmed that Mr Lemon had contacted him on 4 February 2013 but the meeting minutes had not been discussed. Mr Netzler said Mr Lemon had wanted him to intervene in the process, however he had explained to him that Ms Taylor had a process to undertake and that he should channel any comments through her.

[57] Mr Lemon said he had tried to contact Ms Taylor, but had not been able to make contact, and then Ms Taylor had telephoned him about the meeting on 7 February 2013 and he had thought it could be dealt with at that time.

*Meeting held on 7 February 2013*

[58] Mr Lemon said he had attended the meeting with Ms Taylor and Mr Don Robertson, another Idea Services CSM, accompanied by Ms Espinosa as his support person.

[59] Ms Taylor said she had opened the meeting by explaining her findings and her conclusions which were that:

- *There was no need to take the sausages home as there is always plenty of room in residential freezers.*
- *Jack had the opportunity on 29 November 2012, 6 December 2012 and 17 December 2012 to inform me that the sausages were given to him and did not.*
- *Jack asked Betty to replace the sausages on 18 December 2012.*
- *Jack took home sausages, which were the property of people he supports at Idea Services. This is considered theft and therefore serious misconduct.*
- *For this reason I am considering dismissing Jack Lemon on 7 February 2013.*

[60] At that meeting Mr Lemon had produced a letter signed by Ms Langstone and dated 4 February 2013 which stated:

*To whom it may concern,*

*On the 31<sup>st</sup> of January 2013 Huia Peita and I attended a meeting at the Kaitaia Service Centre of Idea services in support of Jack. At this meeting I was asked if I as Co-ordinator of MINDS Trust had given **THOSE** specific “Sausages” in question to Jack or to the service centre; I replied by saying “No I had given **them to Jack himself.**”*

*Jack before taking them home contacted me once again to clarify with me that they were for him as he did not want to be accused of theft of the “**Sausages**” and I again reassured him that they were for him.*

*I hope this clarifies the “Sausages” intrigue and the mystery about them. If you have any further question please do not hesitate to contact me on 09 4040402.*

[61] Ms Taylor said that Mr Lemon again stated that the sausages were his.

[62] Ms Taylor said that she had considered the letter from Ms Langstone to have been unclear as to when she had given the sausages to Mr Lemon, before the service users Christmas party barbeque or at it.

[63] After reading the letter, Ms Taylor said she had asked Mr Lemon why he had not confirmed with her what Ms Langstone said, to which he had responded that he had not done so as he “*knew what would happen.*”

[64] Ms Taylor said that Mr Lemon also told her that he had sent a text message to Ms Kamlade on 18 December 2012 telling her that the sausages were his, and showed her a text message on his phone which read that ‘the sausages are mine but I will replace them’.

[65] Ms Taylor said she had adjourned the meeting to question Ms Higgins and Ms Kamlade about the text message, but both had denied receiving a text message from Mr Lemon on 18 December 2012.

[66] Ms Taylor said that when she resumed the meeting, she had told Mr Lemon and Ms Espinosa what Ms Higgins and Ms Kamlade had said about the text message, and asked Mr

Lemon why he had not contacted her, particularly as he had received no response to the text he had sent Ms Kamlade. Mr Lemon had again responded that he had not done so as he “*knew what would happen.*”

[67] At that point in the meeting, Ms Taylor said she had asked if there had been anything Mr Lemon or Ms Espinosa wanted to say in response to her findings, and she provided them with a break in order to do so.

[68] When the meeting resumed, Ms Taylor said she had asked if there was anything they had wanted to say, but as there was not, she had confirmed her decision to dismiss Mr Lemon.

[69] At that point Mr Lemon had returned the keys to a company vehicle and walked out of the meeting.

[70] Ms Taylor said she had recorded her decision to dismiss Mr Lemon in a letter dated 12 February 2013. In the letter Ms Taylor had set out her findings made during the investigation process and her conclusions which were stated to be:

- *You took the sausages home.*
- *That your actions to replace the sausages following questions put to you about their whereabouts goes towards your intent of having taken the sausages, amounting to theft.*
- *Liz gave mixed messages, initially confirming that the sausages were for the service users, up until 18 December 2013 (sic) and then from 7 January changing her confirmation to say that she had given the sausages to you to take home.*
- *Athena and Jan have both consistently maintained that you showed them the sausages in the freezer and told them Minds Trust had given the sausages to the service users for their Christmas Party on 18 December.*
- *I was in a meeting with you where we discussed the sausages from Minds Trust and the need to purchase a barbeque to cook them on, on 29 November 2012.*
- *Betty confirmed that you took the sausages home but said it was because the freezer at Vocational was too full to keep*

*them there but could not answer why they hadn't been put in the freezer at either of the residential homes.*

[71] Ms Taylor had concluded that:

*... your actions constituted serious misconduct in breach of IHC Staff Policy i.e. you took home sausages, which were the property of people supported by Idea Services, for his private use. This is considered theft and therefore serious misconduct.*

*I believe your actions have irreparably eroded the duty of trust and confidence expected of an employee and for this reason the decision to terminate your employment was made.*

[72] On 11 June 2013 Mr Lemon filed a Statement of problem with the Authority. The parties subsequently attended mediation, but this did not resolve the matters between them.

### **Determination**

[73] An employer may justifiably dismiss an employee who steals money or goods from it, even if the value of the goods is not significant. An act of theft as a servant is a serious matter which has the effect of destroying the trust and confidence which is an essential component in the employment relationship.

[74] However the Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

#### ***S103A Test of Justification***

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[75] Idea Services must show that it carried out a full and fair investigation into the issue of whether Mr Lemon's actions constituted serious misconduct, taking into consideration the

factors in s 103A(3), statutory good faith requirements and natural justice. Idea Services must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

*Procedural justification*

[76] In accordance with s 103A (3) of the Act, Ms Taylor was required to carry out a fair investigation and follow a fair procedure.

[77] *Ministry of Maori Development v Travers-Jones*<sup>1</sup> the then Chief Judge Goddard stated in regards to a fair procedure:<sup>2</sup>

*What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.*

[78] I find that Ms Taylor had carried out an investigation in which Mr Lemon had been advised of the allegations against him, and had been given the opportunity to provide explanations at meetings at which he had been accompanied by support people, which followed the requirements expected of the fair and reasonable employer.

[79] The explanations provided by Mr Lemon and supported by those of Ms Langstone, had been considered by Ms Taylor, however to meet the requirements of a fair procedure, Ms Taylor needed to be open to the possibility that there might be an innocent explanation for what may have been suspicious circumstances.

*Substantive justification*

[80] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*<sup>3</sup>. The Employment Court stated:<sup>4</sup>

*The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If*

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<sup>1</sup> [2003] 1 ERNZ 174

<sup>2</sup> Ibid at para [30]

<sup>3</sup> [2011] NZEmpC 160

<sup>4</sup> *Angus at para [23]*

*the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.*

[81] In *Ministry of Maori Development v Travers-Jones*<sup>5</sup> the Employment Court observed:

*A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.*

[82] During the 'Please explain' meeting on 31 January 2013 Mr Lemon asserted that the sausages had been given to him for his personal use by Ms Langstone on 21 November 2012.

[83] Mr Lemon's assertion had been confirmed by Ms Langstone during that meeting, and she had subsequently reiterated that confirmation in writing in a letter dated 4 February 2013, which letter had been provided to Ms Taylor at the meeting held on 7 February 2013.

[84] Whilst Ms Taylor considered that Ms Langstone's evidence conflicted with that of Ms Higgins and Ms Kamlade, it is not disputed that Ms Langstone had the authority to dispose of the sausages as she wished, and her evidence on 31 January and as reconfirmed on 4 February 2013 was that she had done so by giving them to Mr Lemon for his personal use.

[85] The service users for whom Mr Lemon was responsible are a vulnerable group of people and it is entirely appropriate that Idea Services regarded any breach of trust in relation to their property seriously. Equally an allegation of serious misconduct, namely of theft as a servant, is a serious finding to make against an employee.

[86] Although Ms Taylor was entitled, acting reasonably, to prefer one set of accounts rather than another where these conflicted, her decision that Mr Lemon had committed theft had to be based on reasonable grounds.

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<sup>5</sup> [2003] 1 ERNZ 174

[87] I find that her conclusion that that Mr Lemon had committed an act of theft in relation to the sausages in light of both the oral and written evidence of Ms Langstone, the person to whom the sausages for all intents and purposes belonged, not to be a conclusion that could have been applied by a fair and reasonable employer in the circumstances.

[88] I determine that Mr Lemon was unjustifiably dismissed by Idea Services.

### **Remedies**

[89] I have found that Mr Lemon was unjustifiably dismissed by Idea Services, and accordingly he is entitled to be paid his notice period and any outstanding holiday pay accrued to the end of the notice period.

[90] Idea Services is to pay to Mr Lemon an amount equal to his notice period in accordance with the notice provisions as set out in the relevant collective agreement.

[91] Idea Services is also to pay to Mr Lemon any outstanding holiday pay entitlement to the end of the notice period.

### *Contribution*

[92] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[93] I find significant contribution by Mr Lemon to the situation in which he found himself, in particular Mr Lemon had several opportunities to provide an explanation at an early stage in the proceedings which may have negated the need for any disciplinary action, namely:

- prior to 18 December 2012, when he realised that Ms Higgins and Ms Kamlade were querying the whereabouts of the sausages he telephoned Ms Langstone, and asked for her confirmation that she had given the sausages to him for his personal use, but did not ask her at that point in time, to confirm either in writing or verbally to Ms Taylor that she had given the sausages to him for his personal use;
- on 29 November 2012 at the Vocational Team Meeting;
- on 6 December 2012 when he had been issued with the first written warning by Ms Taylor; and

- on or about 17 December 2012 when he had asked Ms Lovatt to purchase replacement sausages.

[94] Mr Lemon had further been provided with opportunities at the meetings on 31 January and 7 February 2013 to provide responses to the questions from Ms Taylor, however he had not responded to a number of the questions put to him, in breach of the good faith requirements in s4 of the Act, in particular the requirement as set out in s4(1A)(b): “*to be active and constructive ... responsive and communicative*”.

[95] In these circumstances, I assess the level of contribution by Mr Lemon as 100% and accordingly award no remedies in respect of the unjustifiable dismissal, other than payment to Mr Lemon of the contractual notice period and any outstanding holiday pay entitlement.

### **Costs**

[96] Costs are reserved. I note that the Applicant is legally aided. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**