

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 162
5345405

BETWEEN CONTRAX TECHNICAL
 SERVICES (1996) LIMITED
 Applicant

AND GLENN COBURN
 Respondent

Member of Authority: G J Wood

Representatives: Dave McLeod for the Applicant
 No attendance by or for the Respondent

Investigation Meeting: 11 October 2011

Determination: 26 October 2011

DETERMINATION OF THE AUTHORITY

[1] The applicant, Contrax, claims damages of \$600, a *token* penalty and costs against the respondent, Mr Glenn Coburn, for breaching the parties' employment agreement by failing to give one week's notice. Despite calls from the Authority explaining the mediation and investigation processes to Mr Coburn, he did not provide a statement in reply. Neither did he attend on the directions conference, despite having been served notice of it by a process server. The process server subsequently served Mr Coburn notice of the investigation meeting in accordance with the Authority's instructions. Mr Coburn was also sent a copy of the directions notice, which referred to the implications under ss.181 and 182 of the Act of his failure to respond, but he continued to fail to facilitate the Authority's investigation.

[2] Mr Coburn was able to be contacted by a Support Officer on the morning of the investigation meeting, but claimed to know nothing about the investigation meeting. I accept the Support Officer's account that he swore at and was abusive towards her, told her he was too busy to attend and hung up the phone.

[3] Given Mr Coburn's history of avoiding the investigation process, I am satisfied that no good cause was shown for his failure to attend or be represented. I therefore determined to act as fully in the matter as if Mr Coburn had duly attended or been represented.

[4] I have accepted the evidence of the Managing Director of Contrax, Mr Steve Kaye, which was backed by Contrax's documentary records. My findings are therefore as follows. Contrax is a cable installing company and Mr Coburn was employed by it between 20 April 2011 and 3 May 2011, a period of two weeks. He was paid \$15 an hour for a minimum of 40 hours per week.

[5] Mr Coburn was working out well as a good worker. He was told by Mr Kaye that he was to undergo further training, after which his pay rate would be increased. Mr Coburn must have organised himself a new (presumably better-paying) job, however, because he rang on Wednesday, 4 May to tell Mr Kaye that he could shove his job because he had a better one. When Mr Kaye rang to talk to him about it and the lack of notice, Mr Coburn told him that he had started a new job already, that he was not paid enough at Contrax, that he was too busy to talk to Mr Kaye and then he hung up.

[6] Mr Coburn also ignored Contrax's letter advising him of his breach of clause 15 of his employment agreement by not giving a week's notice. Contrax requested to talk to him about it, yet he ignored the request, as he also ignored Contrax's invitation to attend mediation on the issue.

[7] While Contrax did not suffer any identifiable financial losses, it had to rearrange staff between jobs, and Mr Coburn's leaving worsened an existing short staffing situation.

[8] As noted above, clause 15 of the employment agreement deals with termination of employment. It states:

15.1 One (1) week's notice of the termination of the employment shall be given by either party to this agreement, except in proven cases of serious misconduct when no notice needs to be given.

15.2 Should the employee not give the appropriate notice of termination, then the employee forfeits any wages due from the date of ceasing work and the employer may deduct an amount equivalent to the period of notice not worked.

15.3 *Any money or debt owed by the employee to the employer at the time of termination may be deducted from the final pay.*

[9] The term “forfeit” implies that an employee will lose the right to something they would otherwise have been entitled, due to their breach of the contract. Here the forfeiture is made clear as constituting wages due but unpaid, which may include time worked but not already paid out, and holiday pay. The deductions referred to in clause 15.2 relate to the maximum that may be deducted, namely one week’s pay under clause 15.1.

[10] In this case, however, Mr Coburn was paid all his wages earned for all the days he worked, plus two days’ statutory holiday pay and his holiday pay. Had Contrax not paid him any of those sums before Mr Coburn left, it would, under clause 15, have been entitled to withhold or deduct them. However, it did in fact pay Mr Coburn all the sums he was owed, despite his failure to give notice.

[11] I do not accept that Contrax can seek damages for breach of contract, because the week’s pay related to forfeiture rather than damages, and as no financial damages have been demonstrated by Contrax anyway. It is, however, clear that Mr Coburn did breach clause 15 by giving no notice rather than a week’s notice and that he is liable to penalty under s.133(1)(a) accordingly.

[12] Contrax seeks only a *token* penalty and for it to be payable to the Crown. This was a particularly blatant breach of the employment agreement. Mr Coburn gave no thought to his obligations to Contrax, as is clear from his subsequent behaviour. Given the request for only a *token* penalty, I consider a penalty of \$250 payable to the Crown is appropriate, given the limited impact of the breach.

[13] Contrax also seeks costs, plus expenses of \$215.31. I accept that the expenses were reasonably incurred, constituting as they did the application fee and two document service fees, which were necessary because of Mr Coburn’s failure to engage in the investigation process.

[14] I also accept that Mr McLeod’s costs that relate to the Employment Relations Authority application, rather than initial correspondence with Mr Coburn and the Mediation Service, were reasonably incurred, totalling, as they did, \$442.75. These costs were again reasonably incurred given Mr Coburn’s failure to be involved in the investigative process.

[15] I therefore order the respondent, Glenn Coburn, to pay to the applicant, Contrax Technical Services (1996) Limited, the sums of \$442.75 in costs and \$215.31 in expenses.

[16] I also order Glenn Coburn to pay a penalty of \$250 to the Crown.

G J Wood
Member of the Employment Relations Authority