

agreement. Mr Millar offered Mr Dreaver two options, either work his notice period out or pay \$2,500 for breach of the notice requirement. Mr Dreaver chose the first of the two options and advised Mr Millar of this on Friday 5 December.

[5] Mr Dreaver says he told Mr Millar that he would work out his notice period, and this was agreed to. Mr Dreaver was advised to report for work on Monday 8 December. On Monday 8 December at about 9.15am Mr Millar instructed Mr Dreaver that his work would be undertaken in the warehouse for the next couple of days. When enquiring where he would be working after that Mr Millar advised that he had not worked that out yet.

[6] The following day Mr Millar summonsed Mr Dreaver to his office where Mr Millar told him he had made him come back to work as an example to others. Mr Dreaver was then told he could leave and that he did not have to work his notice period out. After making enquiries about other days that he had worked and not been paid for Mr Dreaver says Mr Millar told him he wouldn't see a cent of it. Mr Dreaver told Mr Millar that he was willing to work the notice period out in good faith however, in response Mr Millar told him to f***k off. Mr Dreaver says this amounted to a dismissal.

[7] Through his Statement of Problem Mr Dreaver seeks from the Authority:

- remuneration for days unpaid;
- lost remuneration from the date of dismissal until he finds other work;
- compensation for hurt and humiliation; and
- penalties in the amount of \$2,500 for alleged breaches of good faith in not attending mediation after indicating an initial willingness to do so, for the conduct of the respondent in the events leading up to the dismissal and for refusing to pay Mr Dreaver notice or for time worked.

Arrears of wages claim

[8] Mr Dreaver claims payment for days he says he worked but was not paid plus a day off in lieu having worked on 29 November prior to him commencing employment.

[9] Counsel for the Respondent has advised the Authority that Mr Dreaver has received payment for five days pay and that this finalises the matter of the arrears of wages. I have accepted that as being the end of that matter.

[10] That being the case the only outstanding issue is whether Mr Dreaver is entitled to a days pay being a day off in lieu having worked on Saturday 29 November 2008. I am satisfied on the balance of probabilities that there was no promise to Mr Dreaver that he would receive any payment for this day.

[11] The day was CS's bi-annual sale day. I accept the evidence of the witnesses for CS that Mr Dreaver, who had at that time accepted employment with CS but had not commenced working, was offered an opportunity to go along to the sale for the purpose of seeing the complete product range that he would be selling and to meet other sales representatives.

[12] Mr Dreaver was not on the payroll of CS when he attended the sale. He did not commence employment until 1 December 2008 and is therefore not entitled to a day in lieu for attending a sale for the purpose of meeting the team with whom he would be working from the following Monday.

Unjustified dismissal

[13] There is no dispute that Mr Dreaver resigned. The way Mr Dreaver attempted to leave his employment leaves me to question his credibility. It is common ground that Mr Dreaver advised Ms Gilray his son had been involved in an accident. Instead of simply taking the company car and heading straight to his son's side, Mr Dreaver contacted his father and requested that he pick him up. Mr Dreaver then took time to complete an expenses claim form before leaving it with Ms Gilray. He then left the premises leaving his company car in the car park and the keys on the Reception desk. He gave no indication to Ms Gilray or anyone else that he was dissatisfied with his job and was leaving permanently.

[14] The following morning, Thursday 4 December Mr Dreaver made telephone contact with Ms Gilray and advised that he was leaving his position and would not be returning. Ms Gilray was surprised and reported her telephone conversation to Mr Millar. Mr Millar made contact with Mr Dreaver and advised him he was bound to honour the employment agreement which included the giving and working of the required notice period.

[15] The upshot of that call was that Mr Dreaver returned to work and did so the following Monday, 8 December and was assigned duties in the Warehouse. The next day Mr Millar and Mr Dreaver had a conversation in Mr Millar's office. Mr Dreaver says Mr Miller told him Mr Millar had brought him back to work to prove a point and that he would let him go with no requirement to serve out the notice period. Mr Dreaver says that he asked about payment of wages for the days worked in the Warehouse and the outstanding notice period. He says Mr Millar told him he wouldn't see a cent and then told him to f***k off.

[16] Mr Millar acknowledges he told Mr Dreaver that he had brought him back to work to prove a point. He says he told Mr Dreaver it was obvious he didn't want to be at work, to which Mr Dreaver agreed, and he offered Mr Dreaver the opportunity, if he wanted to, to leave then and there. Mr Millar says Mr Dreaver said he wanted to leave. Mr Millar says that as he was leaving the office, Mr Dreaver made his enquiry about payment for the remainder of the notice period. Mr Millar says that when he told Mr Dreaver he would not be paid for the remainder of the notice period he became abusive toward him and called him a "...loser..." at which point Mr Millar told Mr Dreaver to "f***k off" from his office.

[17] Mr Dreaver attempted to leave his employment in breach of his obligations under the employment agreement to provide notice. When this was brought to his attention he agreed to return to work to work out his notice period. I find this agreement was in the face of a threat that CS would take legal action to recover a sum equivalent of four weeks notice from Mr Dreaver.

[18] I find on the balance of probabilities that it is more likely than not that at the meeting on 9 December Mr Dreaver and Mr Millar reached an agreement that Mr Dreaver would leave his position without the requirement that he work out the notice period.

[19] Further, I find there was no obligation on CS to pay Mr Dreaver for the remainder of the period of notice. Clause 7.17 of the individual employment agreement provides CS with the discretion to pay the equivalent amount of salary in place of all or some of the notice period.

[20] Mr Dreaver does not have a personal grievance for unjustified dismissal as there was no dismissal, rather the parties reached an agreement as to when the employment relationship would end.

Penalties

[21] Mr Dreaver seeks the payment of a penalty for breaches of good faith on the part of CS. I find that Mr Dreaver has not established this claim to my satisfaction and it therefore fails.

[22] Mr Dreaver also seeks the payment of a penalty for a breach of good faith post the ending of the employment relationship. For such a claim, the employment relationships must still be current¹. As the claim relates to actions after the employment had been terminated this claim must fail.

[23] I record here that good faith is a two way street. Mr Dreaver ought first to consider his conduct in the events leading to the termination of his employment. At best he attempted to leave his employment surreptitiously instead of being open and honest about any issues he had in his new job. Given those circumstances, even had I found a dismissal which was unjustified Mr Dreaver would have received no remedies but rather a finding that he contributed significantly to the events that led to the termination of his employment.

Costs

[24] Costs are reserved. 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 CS Company Limited may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority

¹ *Balfour v Attorney General* [2007] 1 ERNZ 808 at paragraphs [30] and [31].