IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 76/10
5144036

	BETWEEN	ROBERT MARK INSTONE Applicant
	A N D	QUEENSTOWN GOLF CLUB INCORPORATED Respondent

Member of Authority:	Helen Doyle
Representatives:	Sheena Naughton, Counsel for Applicant Bruce Boivin, Counsel for Respondent
Investigation Meeting:	29 October 2009 at Queenstown
Submissions Received:	23 November 2009 and 15 February 2010 from the Applicant 8 February 2010 from the Respondent
Determination:	26 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Mark Instone was interviewed and then offered a position as assistant green keeper by Queenstown Golf Club Inc. The Course Convenor, Owen Lavender and the then Club Superintendant, Tony Wilson were present at the interview. Mr Instone was offered full time work at an hourly rate of $19 per hour. Although Mr Instone said that the hourly rate was less than that he could earn as a builder he agreed to accept the offer because he considered the job was a dream role. Mr Instone duly commenced his employment on 20 August 2007.

[2] Mr Instone says that he has several employment relationship problems that he wants the Authority to resolve. He says that the Queenstown Golf Club Inc. acted unjustifiably by unlawfully suspending him from his employment without pay from 8 July 2008 to 31 August 2008, that the respondent breached implied and expressed

terms when it varied his employment agreement and that he was then unjustifiably constructively dismissed in February 2009.

[3] Mr Instone claims:

- $5,628.00 for the two months between 8 July and 31 August 2008 which sum takes into account $300 casual earnings;
- Loss of earnings as a result of the reduction in his hourly rate from 1 September 2008 to 20 February 2009 and two weeks notice in the sum of $1,620.00;
- Compensation in the sum of $20,000;
- Lost wages from 6 March 2009 until employment was obtained by Mr Instone on 29 June 2009 in the sum of $10,710.00 which takes into account earnings by Mr Instone over that period and continuing shortfall in earnings compared to those he received at Queenstown Golf;
- Holiday pay at 8% on the amounts set out above and interest on the amounts awarded;
- Penalties for alleged breaches of his employment agreement and for breaches of good faith;
- Costs.

[4] Queenstown Golf Club Inc. is an incorporated society under the Incorporated Societies Act 1908. I shall refer to the Society from hereon as Queenstown Golf. Queenstown Golf does not accept that Mr Instone has valid grievances against it and/or that it acted in breach of its obligation. Its view of the problem is that Mr Instone had two separate terms of employment with the respondent, with the first term commencing on 20 August 2007 and ending on 8 June 2008. It then says the second term of employment was a fixed term arrangements which commenced on 1 September 2008 and had Mr Instone not resigned, would have ended on 8 May 2009. Queenstown Golf also raises issues as to whether personal grievance or personal grievances were raised in terms of the events prior to and following 8 July 2008 and the end of August 2009.

The Issue

[5] Ms Naughton and Mr Boivin were largely in agreement about the issues for determination. I find that the issues for the Authority to determine in this case are as follows:

(a) Was Mr Instone's employment mutually terminated in June 2008 or was his employment continuous but treated as leave without pay for the period from 8 July 2008 until 31 August 2008 ;

(b) If Mr Instone's employment was terminated whether it was mutually agreed that it would so terminate?

(c) If Mr Instone's employment was continuous and his employment is considered to have been temporarily suspended from July 2008;

- Was Queenstown Golf entitled to reduce Mr Instone's hours and did he agree to this;

- Did Queenstown Golf unjustifiably disadvantage Mr Instone in his employment through unlawful suspension, breach of duty to act in good faith, unfair bargaining, and breach of implied and expressed provisions in his employment agreement and statutory obligations under the Employment Relations Act 2000?

(d) Was Mr Instone unjustifiably constructively dismissed:

- Was Mr Instone's resignation caused by a breach of duty or breaches of duty on the part of Queenstown Golf;

- If it was, then was the breach or breaches of duty sufficiently serious to make it reasonably foreseeable that there was a substantial risk of his resignation.

(e) If the Authority gets to the position of awarding remedies then what should they be and are there issues of contribution and/or mitigation;

(f) Should there be penalties awarded;

(g) As part of the overall consideration of issues in relation to the June, July and August 2008 was there a personal grievance raised with Queenstown Golf within 90 days of the grievance occurring or coming to the attention of Mr Instone.

Whether Mr Instone's employment was mutually terminated in June 2008 or was continuous but treated as leave without pay?

What were the terms and conditions of his employment?

[6] Mr Instone was presented with an individual employment agreement on 30 August 2007 that provided amongst other matters that his normal hours and days of work were from 8am to 5pm Monday to Friday each week and that he was to receive an hourly rate of $19.00. It was not altogether clear from the evidence who gave Mr Instone the agreement although he accepted it could have been Mr Wilson who resigned from his role as Superintendent in early November 2007. Mr Lavender said he did not give Mr Instone the employment agreement. Mr Wilson did not give evidence at the investigation meeting but I find that the agreement was more likely than not given to Mr Instone by Mr Wilson.

[7] When Mr Instone was given the employment agreement he was left with the understanding that the reason the agreement was not to be signed was that it contained a clause that he was to work a probationary period of three months and signing would be considered after the expiration of that three month period.

[8] The employment agreement handed to Mr Instone on 30 August 2007 was never signed. I find it reflected the terms and conditions such as pay, duties and hours of work that had been discussed with Mr Instone at his interview. Mr Instone was unaware of any performance issues after his probationary period expired and said he was reassured that this was the case by Mr Lavender. Mr Lavender said however that he was hearing some complaints about Mr Instone from Mr Wilson and another employee, but decided to leave the matter until a new superintendent was employed for him to sort out and make as he put it, *a call* on Mr Instone's employment.

[9] Mr Instone accepted that when he asked Mr Lavender about the finalisation of his terms and conditions of employment Mr Lavender asked him to wait for the signing of his employment agreement until the new superintendent was employed.

[10] I find in conclusion that the unsigned employment agreement contained the terms and conditions between Mr Instone and Queenstown Golf. They were the terms and conditions that had been offered to him and that he duly accepted at his interview. There was further performance of those terms and conditions with respect to Mr Instone being paid the rate of $19.00 per hour, the hours he usually worked and his duties.

[11] I find that Mr Instone after his probationary period became a permanent employee and Mr Lavender in his evidence at the Authority investigation meeting accepted that that was his understanding of Mr Instone's employment. The fact that the individual employment agreement was unsigned does not affect this finding.

What did Ryan Irwin know about the existence of the unsigned employment agreement?

[12] In March 2008 Ryan Irwin was appointed as the new course superintendent at Queenstown Golf. Mr Lavender said that the first instruction he gave Mr Irwin was to sort out the employment situation with Mr Instone and with another employee also called Mark.

[13] I shall shortly come to the discussions that took place between Mr Irwin and Mr Instone that led to Mr Instone not working over the winter months. Mr Instone did not show Mr Irwin a copy of the individual employment agreement he was handed in August 2007. I readily accept his view that Mr Irwin should have known about the existence of the agreement and/or found out what Mr Instone's terms and conditions of employment were. Nevertheless from my position now of having to determine these matters things may have been different if the employment agreement had been shown to Mr Irwin.

[14] Lorna Cowen was employed as an administrative secretary to Queenstown Golf. Her evidence about whether she could recall seeing Mr Instone's employment agreement was less than clear. She said that she could not be sure that she had ever seen a copy of Mr Instone's employment agreement and she seemed to simply assume he was, as she put it, a permanent seasonal worker from 1 September to 1 June each year. Ms Cowen though did give evidence that Mr Instone's employment agreement would have been held on the computer employee file.

[15] I formed the view from the evidence that there was a considerable amount of general confusion surrounding the unsigned employment agreement that Mr Instone was given in August 2007. This confusion may well have arisen because Mr Instone was told that the agreement would not be signed until he had successfully completed his probationary period of three months.

[16] The existence of a probationary period is not a reason for an employment agreement not to be signed. I think it likely however that after Mr Instone's probationary period had passed that he thought that something else had to happen to formalise his employment and stated that to Mr Lavender. The reality was that nothing further was required and Mr Instone was entitled to, after three months to consider that he was a permanent employee with the terms and conditions that were in the unsigned agreement and being performed.

[17] Although Mr Lavender had been present at the interview, I am satisfied in all probability he was unaware that the terms and conditions discussed had been put into a written employment agreement and given to Mr Instone. I think it likely that he considered when Mr Instone raised issues about his employment that that still in fact had to be done because he was asked by Mr Instone to formalise his employment.

[18] Mr Irwin was then employed and I find his evidence more likely than not that he was told by Ms Cowen and Mr Lavender that Mr Instone did not have a written employment agreement. Mr Instone I accept from time to time raised issues with Mr Irwin about his employment and its status. I find in all likelihood that he wanted to know that his employment was on a formal basis.

[19] I am not satisfied when I look at the evidence that Mr Instone would have made it clear he considered himself a permanent employee. It was properly conceded that Mr Irwin did not know if Mr Instone's employment was fixed term or seasonal either and therefore when I come to discussions about the winter break, there was an element of the unknown. As Mr Instone did not tell Mr Irwin clearly that he had a written employment agreement I do not find that Mr Irwin acted with knowledge contrary to its terms.

[20] I am strengthened in that conclusion that there was general confusion because Mr Instone, in the most likely document to contain some reference to a written employment agreement (Document 5) prepared in or about September 2008 made no

reference to the existence of any written employment agreement. I shall come to look at that document in more detail later in this determination. I am further strengthened in that conclusion because in December 2008 Mr Instone recalls being approached by Mr Irwin who asked whether he had originally been taken on as a permanent or casual employee.

[21] I do not find therefore that Mr Irwin was aware of the unsigned employment agreement that had been handed to Mr Instone some ten days after his employment at Queenstown Golf commenced.

Discussions about the winter period of June 2008

[22] Mr Instone booked three weeks leave for June 2008 so that he could take an overseas holiday. Mr Instone understood that Queenstown Golf encouraged employees to take leave over the quieter, slower winter months when there was no grass growth. Mr Irwin had no difficulty with Mr Instone taking the leave although I accept that Mr Irwin may have misunderstood that instead of three weeks Mr Instone was taking six weeks leave. Not a lot turns on that. I find it likely that there was an initial discussion of this leave in or about April 2008.

[23] Mr Irwin advised Mr Instone that there was not enough work over the winter. Mr Instone said that he was told he should take all his accrued leave and then the balance of three months as unpaid leave. Mr Instone said that he never accepted this suggestion and was very reluctant to take unpaid leave. Over the months between April and before Mr Instone commenced his leave on 8 July 2008 there were several discussions about the leave with Mr Irwin.

[24] Mr Irwin said that as far as he was concerned Mr Instone's employment was at an end when he took his leave and he was paid out all his holiday pay and other entitlements but that there was a possibility of re-engagement again in September and of some casual work prior to that. Mr Instone did not accept that there was a discussion of that nature and said that Mr Irwin never suggested to him that his employment would come to an end and he never for a moment thought that was the position. He said that all that was raised with him was taking unpaid leave over the winter months.

[25] Mr Irwin's oral evidence at the Authority's investigation meeting was along the lines that he felt *Mr Instone was okay with agreeing to not work for winter.* I

found his evidence to be less certain at the Authority's investigation meeting than his written statement of evidence in which he said it was agreed that Mr Instone's employment would end.

[26] Both parties agreed that on Mr Instone's return on 8 July 2008 he went to Queenstown Golf to inquire about the availability of work. Mr Irwin advised that there was no work available but suggested that he contact the club again to make inquiries about the availability of work. It is common ground that between 8 July 2008 and 31 August 2008 Mr Instone did not perform any work at the Queenstown Golf Club.

[27] I find it likely that Mr Instone resisted the notion of unpaid leave and did not agree to it. Matters were left on the basis that Mr Irwin advised that there was a possibility of some casual maintenance work for the few days per week from the date Mr Instone returned from his holiday. I find that Mr Instone then took the leave believing that on his return to have at least some days work.

Was Mr Instone's employment terminated in June 2008, or was it continuous but treated as leave without pay?

[28] Employment may be brought to an end by the agreement of both parties to an employment relationship. This is known as a mutual or bilateral agreement to terminate. There have been several cases in the employment area dealing with this issue and Ms Naughton and Mr Boivin have referred me to some of these.

[29] Ms Naughton relied on the case of *Canterbury, Westland etc Clothing and Related Trades IUOW v. Donna Ray Models Ltd* (1982) ACJ 423 where an employee asked for a week of the August holidays off to care for her children without pay believing she had exhausted her leave entitlement. The employer was not prepared to agree to leave and suggested termination with possible re-engagement which was reluctantly given by the employee because of the pressures that she faced. Re-engagement never took place. The Court found that there was a mutual agreement to terminate employment. In that case there was no dispute that the employer's proposal to terminate happened clear enough to be accepted, even if reluctantly.

[30] The sorts of cases where the Court has had to consider whether there was a mutual agreement to terminate usually involve an employee requesting a leave of absence of some sort and the focus is on the contractual entitlement/obligations on

return – *Journalists & Graphic Process Union (JAGPRO) v. Western Litho Ltd* [1991] 1 ERNZ 9434 and *Electricity Corporation of NZ Ltd v. Public Service ASSM (IBC)* [1989] 1 NZILR 387.

[31] This case can be distinguished from those above. In those cases the employee wanted to take some leave for their benefit but in this matter Mr Irwin asked Mr Instone to take unpaid leave for the benefit of Queenstown Golf. I am not satisfied the evidence supports with certainty that appears in other cases any agreement to termination by Mr Instone of his permanent employment with a possibility in the future of re-engagement. I find that there was no clear evidence that Mr Irwin ever suggested to Mr Instone that his employment had ended and that he would be re-engaged.

[32] Some reliance is placed by Mr Boivin on the fact that Mr Instone did not fill in an application for leave or put his leave on the calendar and was paid out his entitlements that his employment was coming to an end. I do not find that changes my conclusion that there was no mutual agreement in this case to terminate the relationship. For completeness there was nothing in Mr Instone's agreement providing that he could be required to take unpaid leave and I do not find that this was a situation where Mr Irwin intended to or did follow any process in relation to terminating Mr Instone's employment for reasons of redundancy.

[33] I find that Mr Instone simply took his holidays as planned believing that there would be some work for him over the winter period, even if it was simply of a casual nature. Mr Instone on return from holiday went to the workplace but was advised on that occasion and when he inquired again that there was no work available. He may well have, had there been casual work available, agreed to reduced his hours but matters never got to that point. Instead I find Mr Instone was required to take a period of unpaid leave that he did not want and did not agree to.

[34] I do not find that there was agreement to take unpaid leave on the part of Mr Instone but matters were simply left on the basis that there may be some work for him on his return. To all intents and purposes Mr Instone's employment was suspended without his agreement from the time he was available to return to and attempted to work on 8 July 2008 until his resumption again with Queenstown Golf on 1 September 2008.

[35] It is the position of Queenstown Golf that on 1 September 2008 Mr Instone entered into a new employment agreement and recommenced employment again from that point but it will be clear that that is not the finding that I have come to.

Was a grievance raised about these matters within the statutory timeframe of 90 days?

[36] The 90 days within which to raise a personal grievance about these issues that Mr Instone had been disadvantaged in his employment by unjustified actions of his employer ran I find from 31 August 2008. After that time Mr Instone returned to work again at the Queenstown Golf on 1 September 2008 having signed an employment agreement on 25 August 2008.

[37] The evidence about the raising of a grievance in the 90 days following that period was limited. Mr Instone said that from September 2008 he questioned the ability of Queenstown Golf to impose a period of unpaid leave. I find however that it is more likely that Mr Instone's concerns at that stage were about the events surrounding the signing of his employment agreement on 25 August 2008. I have considered the timeline he prepared and gave to Mr Irwin in late September 2008. That does not raise in a satisfactory way the issue of a grievance about the period between 8 July and 31 August 2008 so that the Club would understand what the issue was so as to be able to respond to it.

[38] I am not satisfied that there was a grievance of unjustified actions causing disadvantage raised within 90 days about the period of unpaid leave. I accept that it was in all likelihood not raised until at least December 2008.

[39] In the circumstances the sensible way to resolve the employment relationship problem for this period is to enforce the employment agreement for the period between 8 July 2008 when Mr Instone was available to work until Friday 29 August 2008.

[40] Mr Instone I find is entitled to recover the wages for that period that if he had been allowed to work he would have been paid. I have arrived at the same gross figure that Ms Naughton did of $5,928.00 being lost wages for a period of seven weeks and four days from Tuesday 8 July 2008 to Friday 29 July 2008 at a weekly amount based on 40 hours at $19 per hour of $760.00 gross. From that figure the sum of $300 is to be taken off being casual earnings that Mr Instone received when he

undertook some work for a friend over that period and I arrive at an amount of $5,628.00 gross.

[41] I order Queenstown Golf Club Inc. to pay to Mark Instone the sum of $5,628.00 gross being reimbursement of wages owing under the terms of his employment agreement for a period of seven weeks and four days.

[42] I am also of the view that interest should apply to that amount under clause 11 of the Second Schedule to the Employment Relations Act 2000 at the rate of 4 % which does not exceed the 90 day bill rate at the date of this determination, plus 2% from 1 September 2008 until the date of payment.

[43] I am persuaded because I find that the employment continued but was suspended for that period and did not terminate that there should be as claimed an award of holiday pay on the gross amount of $5,628.00 at 8% in the sum of $450.24.

Was there unfair bargaining about the agreement signed on 25 August 2008?

[44] Mr Instone was asked to attend what I find was described by Mr Irwin as a *review meeting* on 25 August 2008 with Mr Irwin and Mr Lavender. Having considered the evidence I find it more likely that Mr Irwin did make reference to going over an employment agreement with Mr Instone at the meeting. Even if Mr Instone had not appreciated this I am satisfied because he said he thought he might get an increase in his hourly rate that the meeting could impact on his terms and conditions of employment even in a positive way.

[45] Mr Instone was duly presented at the meeting with a two page employment agreement. He noticed immediately that his hourly rate had been reduced in the agreement from $19 to $17.50. Having considered the evidence I find it likely there was some discussion about this and that Mr Irwin made a comparison with another employee who was paid at this rate who he said was better qualified than Mr Instone as a greens keeper. Mr Instone advised Mr Lavender and Mr Irwin that he was not going to lose his job for $1.50 per hour. Mr Instone said that he saw the meeting and the presentation of the employment agreement as a *take it or leave it* situation and said that aside from the hourly rate he did not notice that the agreement itself was expressed to be a fixed term agreement. There was a dispute as to whether Mr Instone was advised he could take independent advice about the agreement.

[46] This is an important dispute to resolve because there is a claim that Queenstown Golf's actions in terms of this employment agreement breached the obligations under the Employment Relations Act of good faith and that the actions of Queenstown Golf in securing a signature to this agreement amounted to unfair bargaining. Mr Lavender was at the meeting with Mr Irwin and I found him to be a straightforward witness who gave evidence that could not always be said to be helpful to Queenstown Golf. For example, in contrast to Mr Irwin's evidence Mr Lavender said he still considered Mr Instone an employee of the club over the winter who was simply taking time off.

[47] Mr Lavender recalls Mr Instone reacting over the hourly rate and I find that very likely given that he accepts he made the comment that he was not going to lose his job for $1.50 per hour. Mr Lavender said that he advised Mr Instone that he did not have to sign the agreement and could take it away and get some advice. Mr Lavender could not recall talking about the fixed term nature of the agreement with Mr Instone although Mr Irwin said that he was sure that he [Mr Irwin] did. Mr Lavender said that Mr Instone then simply signed the agreement straight away.

[48] I accept Mr Lavender's evidence as more likely that Mr Instone was told when it clear that he was surprised in the reduction of his hourly rate that he could take the agreement away and get advice. Mr Lavender knew that Mr Instone was being paid a higher hourly rate that was contained in his employment agreement.

[49] I have also considered whether there was conduct on the part of Mr Irwin and Mr Lavender designed to mislead and deceive Mr Instone. If there was then that would be in breach of the statutory obligations of good faith in the Employment Relations Act 2000.

[50] The employment agreement was two pages in length and contained nine clauses. At the very top of the agreement there was the following advice:

> *You are entitled to take independent advice about this agreement if you wish. By signing this agreement you acknowledge that you have a reasonable opportunity to do so.*

[51] I accept Mr Instone's evidence that he did not notice that the agreement was for a fixed term and because of this I accept that this was not a matter directly pointed out to him. The term of the agreement is mentioned in clause 1 to be from

1 September 2008 to 8 May 2009. In clause 2 the description of the work is described as a fixed term golf course assistant and clause 6 is headed fixed term and again refers to the term of the agreement as in clause 1.

[52] Although I concluded that nobody at the meeting directly pointed the fixed term of the agreement out to Mr Instone I am not satisfied there was an attempt to deceive him about this. I have found earlier in this determination that Mr Irwin was unaware of Mr Instone's previous unsigned employment agreement and unaware that Mr Instone was a permanent employee. Mr Instone did not mention his unsigned employment agreement during the meeting and I accept Mr Irwin's evidence that he considered that the fixed term agreement presented to Mr Instone during the meeting was the first time Mr Instone's employment terms and conditions had been formalised in writing.

[53] Mr Instone felt under some pressure to sign the agreement and I accept that was because he had been without work and therefore income from Queenstown Golf since 8 July 2008. As at the date of the meeting however he still had a week before 1 September within which to obtain some advice about what was a very short agreement. I am not satisfied that Mr Instone was under the sort of pressure that he would not have been able to take the agreement away had he wanted that. Indeed I found that there was a suggestion to that effect. I am quite certain that had Mr Instone taken the agreement away for advice then that advice would have been to not sign it. I am quite certain too that his adviser would have told him to show his employer the earlier unsigned employment agreement and things may well have gone quite differently.

[54] Mr Instone said that he signed the employment agreement and decided to resolve matters at a later date with Queenstown Golf. He thought he would at that time sign the agreement and get back to work and that he was certain he would be reimbursed in time for the shortfall between his previous hourly rate of $19 and $17.50 in the new agreement. That was, with respect, a rather risky approach to the matter. If everyone simply signed contracts on that basis then parties would not know where they stood. I find that Mr Instone agreed on 25 August 2008 to vary the terms and conditions of his employment and to reduce his hourly rate from $19 to $17.50.

[55] The matter that was of more concern to Mr Instone was that his contract was expressed to be for a fixed term ending on 8 May 2008. I agree with Ms Naughton

that there is a strong argument that the agreement does not comply with s.66 (4) of the Employment Relations Act 2000 because there is nothing in writing as to the reasons for the fixed term for employment. Section 66(5) provides that a failure to comply with sub-section (4) does not affect the validity of the employment agreement, but what it does mean is that if there is no compliance with s.66 (4) then Queenstown Golf may not rely on the fixed term to end Mr Instone's employment unless he agrees.

[56] Mr Instone contacted a solicitor when he discovered that the agreement was fixed term and the solicitor advised him that he write a letter withdrawing from the agreement.

Events between 1 September 2008 and 20 February 2009

[57] When Mr Instone returned to work on 1 September 2008 he undertook his work as usual. I find it likely however that he verbally advised Mr Irwin that he did not believe it was legal for Queenstown Golf to change his terms and conditions and that he would confirm in writing the withdrawal of his signature from the agreement.

[58] Mr Instone then wrote a letter which although dated 2 September 2008 I find was in all likelihood not shown to Mr Irwin for about a week or ten days after that date. In the letter Mr Instone advised that he wished to withdraw his signature of acceptance of the terms and conditions of the contract presented at the review meeting. The letter says nothing further.

[59] It was accepted by Mr Irwin that Mr Instone verbally advised him when he showed him this letter that he felt Queenstown Golf had done something wrong and that he needed to be permanent employee at $19 per hour.

[60] Mr Instone said in his written evidence that Mr Irwin did nothing about this. I don't accept that and I find that Mr Irwin proceeded to get some advice from the Department of Labour about withdrawing a signature from an employment agreement. Mr Irwin was advised I find that withdrawing a signature was not straightforward and I accept his evidence that he did talk to Mr Instone about this. The new pay rate of $17.50 per hour was implemented.

[61] I am satisfied that it would have been clear that Mr Instone continued to be unhappy with the employment agreement because towards the end of September 2008 he provided a timeline to Mr Irwin that I have referred to earlier. The timeline simply

set out key events between the interview for the position and September 2008 when Mr Instone had given a letter to Mr Irwin withdrawing the signature from his employment agreement.

[62] I find that both parties independently attempted to organise mediation through the Department of Labour. Mr Instone in his evidence may not have been aware of this. I am not satisfied that Mr Irwin simply refused to deal with the issue.

[63] Mr Instone continued working between 1 September and December 2008. He found this a particularly stressful time and part of this was because he did not feel he had strength to share the situation with his wife until shortly before mediation was to take place in December 2008. Mr Instone said that keeping the situation to himself caused him a lot of stress and impacted negatively on his relationship. As it transpired mediation did not take place until January 2009

[64] On 20 December 2008 Mr Instone was approached by Mr Irwin who asked him if he was originally employed as a permanent or casual employee. Mr Instone confirmed that he was a permanent employee and said he was most surprised that Mr Irwin had not reviewed and considered his earlier employment agreement. Mediation was not successful in resolving the issues between the parties.

Was Mr Instone unjustifiably constructive dismissed?

[65] Mr Instone gave written notice of his intention to resign on 20 February 2009 and was paid two weeks in lieu of notice. His letter of resignation whilst otherwise an ordinary letter ended with the words *thanks for nothing.*

Was Mr Instone's resignation caused by a breach of duty on the part of Queenstown Golf?

[66] Mr Instone referred to several matters that he says amounted to breaches of duty on the part of his employer that caused his resignation. The matters that he relies on occurred after the unsuccessful mediation although against the background of the employment agreement signed on 25 August 2008.

[67] Mr Instone says that they occurred against the background where Mr Irwin was constantly cheerful and friendly towards him and complimentary about his work. Mr Instone also accepted that Mr Lavender was polite towards him.

[68] The first matter relied on was a practical joke that Mr Instone had fallen for when he went to drink a bottle of beer after work. He found that the bottle of beer was filled with water. He said that he felt particularly humiliated by this act in front of other employees because it came shortly after the unsuccessful mediation. Mr Instone sent a text to Mr Irwin and said *I didn't think even you'd stoop that low*. He said that Mr Irwin sent text back *water*. Mr Irwin in his evidence said he sent a text back *WAT*. Regardless of what was said by Mr Irwin this was clearly a practical joke and Mr Instone the victim. Mr Irwin knew something about the water filled beer bottle. Even if the joke was in poor taste, and came at a bad time for Mr Instone, I am not satisfied that this could be seen as a breach by Queenstown Club of its employment obligations. It would have been clear to Mr Irwin that Mr Instone was angered by the joke but there was no evidence of any repetition.

[69] Mr Instone felt that after mediation he was treated differently by other employees and they were annoyed towards him. I am not satisfied that this sort of behaviour was encouraged by Mr Irwin. Mr Irwin had advised Mr Instone to keep mediation confidential and I am not satisfied from the evidence that Mr Irwin advised other employees of the confidential matters discussed at mediation. I do not find there was any breach of Queenstown Golf's duties in this regard.

[70] Mr Instone was provided with the following letter in his pay packet about nine days after mediation on 23 January 2009:

> *Dear Mark*
>
> *Your employment with Queenstown Golf Club Incorporated*
>
> *You have a fixed term employment contract with the Queenstown Golf Club Incorporated.*
> *The finish date is noted in your fixed term contract as 8 May 2009 and this letter is formal notice from the Queenstown Golf Club Inc. that your final day of work will be 8 May 2009.*
>
> *On that day you will be paid all wages due and owing to you together with holiday pay and all other entitlements.*
>
> *Yours faithfully*
>
> *Queenstown Golf Club Inc.*
> *Per*
> *Administrative Secretary*

[71] Mr Boivin wrote a letter to Ms Naughton that was produced as part of the applicant's documents on 24 March 2008, explaining that he had prepared the letter although it had been sent under Ms Cowen's name. He said in his letter that he had done this because this had been requested by Mr Instone and his adviser following mediation. Mr Instone categorically denied that any information of this nature was requested.

[72] I find it unlikely that there was no request for such information because otherwise why would Mr Boivin have written such a letter for the Club. The fact that the letter was drafted by Mr Boivin but sent out in Ms Cowen's name is not unusual where there is an ongoing employment relationship although when Mr Cowen was questioned on the letter by Mr Instone she told him that Mr Boivin had drafted it and seemed annoyed that it had her official title on it.

[73] The letter from Mr Instone's perspective put Queenstown Golf's legal position in no uncertain terms. As I have earlier set out Mr Instone probably had the law on his side because there were no reasons given for the fixed term in his employment agreement. I do not find that the actions of Queenstown Golf in this regard were such to amount to a breach. It cannot be a breach for one party to an employment relationship to put their view about a matter. If there was some misunderstanding about the letter then Mr Instone should have discussed the matter with Mr Irwin.

[74] A further difficulty for Mr Instone in relation to this letter is that it refers to an event that is to take place in the future. The Court of Appeal in *Business Distributors Ltd v. Patel* [2001] ERNZ 124 has held that an employee is not entitled to point to the employer's possible future conduct as causative of resignation. Queenstown Golf may not have ended the agreement for reason of its fixed term.

[75] Mr Instone then referred to an exchange that had taken place with Mr Irwin on 27 January 2009 in which I find it likely Mr Irwin confirmed that Mr Instone's employment would end on 8 May. I am less certain from the evidence that Mr Irwin was categorical about Mr Instone not being offered a further contract with Queenstown Golf but Mr Instone may well have formed a view about that because there was a discussion about the possibility of taking on juniors. That matter however also is one about Queenstown Golf's possible future conduct.

[76] Mr Instone then said that on 19 February 2009 the last straw occurred for him in that he was talking to Peter Trainer who was then employed at Queenstown Golf as the mechanic. Mr Trainer advised that he had overheard a conversation between Mr Ray Crimp who was Mr Irwin's second in charge and Mr Irwin that they were going to try and pin a warning on Mr Instone. Mr Instone felt at that stage that the actions of his employer made it intolerable for him to continue to work and that he believed that Mr Irwin had made it clear that he was trying to get rid of him and therefore Mr Instone said he felt he had no option but to resign.

[77] Mr Irwin said that the only time he was talking to Mr Crimp about a warning was when Mr Instone was away for two consecutive days in late January without approval. Mr Instone's recollection of having been away in January 2009 was unclear. Mr Irwin said that he sought some legal advice about the situation and was told that if the reason for leave was unsatisfactory when Mr Instone was questioned on his return then he could be warned. Mr Irwin said that as it turned out he did not warn Mr Instone on his return but reminded him to fill out leave forms and show the dates of his leave on the work calendar. Mr Irwin said and I accept this that Mr Instone was not working on 19 February 2009 which does cast some doubt on the dates. I do not find that this matter could be relied on as either conduct designed to encourage Mr Instone to leave or as a breach of obligations on the part of Queenstown Golf.

[78] I accept that Mr Instone resigned from his employment because he was unhappy, particularly at the change in his terms and conditions of employment and felt that his concerns and issues remained unresolved. I am not satisfied however that there were breaches on the part of Queenstown Golf that caused his resignation.

[79] Mr Instone had an employment relationship problem but before that employment relationship problem could be resolved he made a decision to resign. There were other options available to him. He could have sought advice about his fixed term contract and if he did not think further mediation would resolve his concerns he could have asked the Authority for assistance even on an urgent basis before the agreement expired.

[80] I am not satisfied that Mr Instone has made out his claim that he was unjustifiably constructively dismissed and I am further not satisfied that the actions on the part of Queenstown Golf were unjustified actions because the change in his hourly

rate was agreed to and he already had adequate protection under the Employment Relations Act 2000 in terms of the fixed term agreement in which no reasons had been provided.

[81] Mr Instone's claim under both those heads is dismissed.

Penalties

[82] I have been asked to award penalties under the Employment Relations Act for various breaches of Mr Instone's employment agreement and breaches of provisions under the Employment Relations Act 2000.

[83] I shall turn firstly to s.63A of the Employment Relations Act 2000. I find that Mr Instone, after he was provided with a copy of the intended employment agreement, was advised that he could take it away and seek advice. The only issue that Mr Instone raised at the time in his employment agreement was the difference in his hourly rate but he then said he would not lose a job for $1.50 per hour. If there had been other issues I am satisfied that Mr Instone did have an opportunity to raise them.

[84] In turns of the earlier employment agreement had Mr Irwin been aware of its existence then I would without question have reached a view that the actions of Queenstown Golf were not in good faith. I find however that Mr Irwin and Mr Lavender in ignorance of the earlier unsigned employment agreement and some of the more technical aspects of employment law took various questionable steps. Mr Instone did not clearly put to either Mr Lavender or Mr Irwin the correct state of affairs so that I can conclude they simply ignored his existing terms and conditions.

[85] I have considerable sympathy for Mr Instone but I do not find that there was a deliberate lack of good faith on the part of Queenstown Golf to deprive Mr Instone of his terms and conditions. Rather this was an unfortunate set of circumstances that required some careful analysis in order to resolve issues.

[86] In those unusual circumstances I am not minded to award penalties for breaches of either the employment agreement or the Employment Relations Act 2000.

Costs

[87] I reserve the issue of costs. Mr Instone has had some success in this case and Ms Naughton has until 15 April 2010 to lodge and serve submissions as to costs and Mr Boivin has until 29 April 2010 to lodge and serve submissions in reply.

Summary of findings and orders made

- I have not found that the parties mutually terminated their employment relationship in July 2008.
- I have not found that personal grievances in relation to unjustified actions causing disadvantage were raised within 90 days from 31 August 2008.
- I have made an award in terms of Mr Instone's employment agreement for unpaid wages between 31 August and 1 September in the sum of $5,628.00 gross.
- I have ordered interest to apply to the amount of $5,628.00 gross at the rate of 4%.
- I have also awarded holiday pay at the rate of 8% on that amount given my findings that employment continued for that period and did not terminate in the sum of $450.25.
- I have dismissed Mr Instone's claims that the unjustifiable actions of Queenstown Golf caused him to disadvantage after that date and that he was unjustifiably constructively dismissed.
- I have not awarded penalties in this matter.
- I have reserved the issue of costs and timetabled for submissions.

Helen Doyle
Member of the Employment Relations Authority