

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 7/09  
5107445

BETWEEN                      NICOLA RUSSELL  
   Applicant  
  
AND                              FIRST SECURITY GUARD  
   SERVICES LIMITED  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:            Mark Henderson, Counsel for Applicant  
   Mike Mulholland, Advocate for Respondent  
  
Investigation Meeting:    25 September 2008 at Christchurch  
  
Submissions received:    9 October and 6 November 2008 from Applicant  
   31 October 2008 from Respondent  
  
Determination:             26 January 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Nicola Russell was employed by First Security Guard Services Limited (First Security) as a Security Guard at the Christchurch Engine Centre (CEC) from 23 April 2007 until she tendered her resignation on 24 July 2007 giving one month's notice until 24 August 2007.

[2] First Security is a wholly owned subsidiary of ISS Facility Services Limited and provides a contract security guard and patrol service.

[3] Ms Russell was party to an individual employment agreement (the agreement) with First Security dated 27 March 2007. The agreement, although referring generally to hours of work, was silent as to Ms Russell's actual hours of work. There was no dispute that at the time her employment commenced she were advised her

usual hours of work at the Christchurch Engine Centre were from 7am to 12pm five days a week. First Security knew when Ms Russell commenced employment that her husband, Lindsay Russell ran his own security company which had the Northern Western Christchurch/ Canterbury Security contract for ADT Armourguard (ADT).

[4] Ms Russell says that she was disadvantaged by the following unjustified actions of her employer:

- She was promised extended hours of work in July 2007, but there was a breach of the agreement to extend her hours when the decision to extend was withdrawn at a meeting on 24 July 2007;
- At three meetings First Security held with Ms Russell, she was not advised to obtain representation, serious allegations were made and the process at each meeting was otherwise unfair and not in accordance with good faith;
- Ms Russell says that she was unfairly suspended for most of her notice period;
- Ms Russell was not paid outstanding wages for the notice period until one year after the date of termination of employment.

[5] Ms Russell says that her resignation was in the nature of an unjustified constructive dismissal because the way the meeting was conducted by First Security on 24 July 2007 amounted to a serious breach of duty on the part of First Security.

[6] Payment of one week's unpaid wages was made to Ms Russell following the Authority investigation meeting. Ms Russell also wanted to recover lost wages, but information provided established that alternative employment had been obtained during the notice period and as a result there was no lost wages. Ms Russell seeks payment of the sum of \$10,000 compensation for hurt and humiliation.

[7] First Security does not accept it agreed with Ms Russell that she could work the extended hours and says it was justified in advising her that operational considerations and costs made extended hours impracticable. It says that the meeting on 24 July 2007 was not a disciplinary meeting and the concern that Ms Russell was working for a competitor was raised following the discussion about the hours but that

the manager at the meeting advised Ms Russell that he accepted her explanation and it was not intended the matter would go further. First Security says that it acted fairly and reasonably during the meeting at which Ms Russell was placed on what it says was garden leave for the balance of her notice period. It does not accept that Ms Russell was disadvantaged during her employment or that there were any breaches on its part that would support a claim that she had been unjustifiably constructively dismissed.

[8] First Security say that Ms Russell breached the non solicitation and conflict of interest provisions in her individual employment agreement contained in clauses 24 and 25 together with the implied duty of fidelity. First Security seeks penalties for the breaches.

[9] Ms Russell denies breaching the provisions of her employment agreement and says that there should not be any penalties imposed.

### **The issues**

[10] The issues for the Authority to determine are set out below:

- Was there an agreement to extend Ms Russell's hours and did First Security breach that agreement?;
- Was Ms Russell unjustifiably constructively dismissed from her employment as a result of the conduct at the 24 July 2007 meeting?;
- Was Ms Russell's employment or conditions thereof affected to her disadvantage by unjustifiable actions of First Security?;
- If Ms Russell was unjustifiably constructively dismissed or disadvantaged in her employment then what remedies is she entitled to and are there issues of contribution?;
- Did Ms Russell breach provisions of her employment agreement and, if so, should a penalty be imposed?

***Was there an agreement to extend Ms Russell's hours and did First Security breach that agreement?***

[11] Ms Russell worked the morning shift at the CEC at Christchurch Airport and another employee of First Security, Diane, worked the afternoon shift at the Engine Centre from 12pm until 5pm. Diane advised Ms Russell in or about early July 2007 that she was going to leave the Engine Centre and guard elsewhere for First Security.

[12] Ms Russell, upon being advised of this by Diane, contacted the Branch Manager of First Security, Lynne McCloy, and told her she would like to do both her role and Diane's, thereby extending her hours.

[13] The evidence which is supported by email traffic between Ms McCloy and Ms Russell was that Ms McCloy referred to some difficulties with one person doing the role. Some of these difficulties were around relief breaks, leave and sick leave.

[14] Ms McCloy said that she felt under some pressure to do her best to endeavour to give Ms Russell the hours because Ms Russell threatened to leave, I accept only from CEC and not First Security, if she did not get the extended hours. Ms McCloy did not want at that stage to lose both Diane and Ms Russell from CEC and she considered Ms Russell to be a very good guard.

[15] Both Ms McCloy and Ms Russell gave evidence about a telephone discussion on 13 July 2007. Ms Russell said that she took from the telephone call that the extended hours were hers and duly advised the Facility and Maintenance Coordinator at CEC, Lyn Murphy, and another person about this. Ms McCloy said that the discussion on 13 July 2007 was about the possibility of another Security Guard covering Ms Russell's lunch break. Her evidence was that whilst she was still trying to work the hours out as best she could, they were not confirmed during that telephone conference.

[16] I conclude that Ms McCloy may have come across as very hopeful that Ms Russell's hours could be extended by virtue of the other Security Guard, Rob Lidgett, being used for relief. I accept that Mr Lidgett's presence to undertake some training at CEC Centre would have contributed to Ms Russell's belief that her hours would almost inevitably be extended. I am not satisfied however from the evidence that there was an agreement or a meeting of the minds at the time of that telephone call about an actual extension of Ms Russell's hours of work.

[17] Ms McCloy felt under increasing pressure from Ms Russell to confirm to her that her hours of work would be extended. Ms McCloy continued to have reservations about the viability of one person performing the hours required at the Christchurch Engine Centre and the ability of Mr Lidgett to undertake cover. Ms McCloy did not feel capable of dealing with Ms Russell's expectations that the hours would be hers so she discussed the matter with the Regional Manager of First Security, Steve Wake. Mr Wake was concerned about the practicalities in agreeing to a full time position for a variety of reasons. He suggested to Ms McCloy that a meeting be arranged at First Security offices with Ms Russell to make it clear to her why her hours could not be extended. Ms Russell was advised that a meeting was to be held on 24 July 2007 although she was not aware that Mr Wake would be attending at that meeting with Ms McCloy.

[18] I am not satisfied from the evidence that prior to the meeting on 24 July 2007 there was an agreement by First Security to extend Ms Russell's hours at the Christchurch Engine Centre. The advice that Ms Russell was given at the meeting on 24 July 2007 that her hours would not be extended, whilst extremely disappointing for her, was not, I find, a breach of any agreement. I am strengthened in my view that no agreement was reached by Ms Russell's resignation letter dated 24 July 2007 which I shall refer to in more detail later in this determination because it provides, amongst other matters, in relation to the afternoon meeting to *discuss the possibility of increasing my shift/hours at CEC ....*

***Was Ms Russell unjustifiably constructively dismissed as a result of the 24 July 2007 meeting?***

[19] Ms Russell's claim for unjustified constructive dismissal falls within the third category of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees IUOW v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 that a breach of duty by First Security caused her to resign. The breach alleged to have occurred on 24 July is a breach of good faith and a breach of the implied term that an employer must not conduct itself in a way that destroys or seriously damages the trust and confidence that an employee must have.

[20] The approach to a claim of unjustified constructive dismissal is a two stage one. The first question for the Authority is whether the resignation has been caused by a breach of duty which involves considering all the circumstances of the

resignation and not simply the letter of resignation. The second stage is whether, if there is such a breach of contract, it was sufficiently serious to make it reasonably foreseeable that Ms Russell would not be prepared to continue working at First Security.

[21] Ms Russell said that within half an hour of arriving home after the meeting on 24 July 2007 she wrote a letter of resignation, after talking about the meeting and matters discussed with her husband. The letter of resignation provided:

*Dear Lynne,*

*I hereby formally tender my resignation from First Security, giving 30 days notice (as per employment contract) as of the above date **24 July 2007**, making my last day of employment **Friday August 24th 2007**.*

*After this afternoon's meeting with yourself, and Steve to discuss the possibility of increasing my shift/hours at CEC (Christchurch Engine Centre). I have decided it is in my best interest, before any more accusations, and allegations of a conflict of interest as stated by Steve go any further.*

*I have been more than loyal after starting employment with First Security, and have been deeply hurt by these comments.*

*Nicci Russell*

[22] Ms McCloy was not at the offices of First Security when Ms Russell returned later in the day on 24 July 2007 to hand in the letter. First Security did not talk to Ms Russell about her resignation letter and although surprised by it, accepted Ms Russell's resignation.

[23] Ms Russell confirmed during the Authority investigation meeting that the cause of her resignation was not as a result of the fact her hours of work were not extended. She said that she understood the reasoning given to her by Mr Wake about the difficulties with extending her hours at the Christchurch Engine Centre. Ms Russell said she resigned because she thought she was going to be *fired for breaching her contract*.

[24] Although the meeting which Ms Russell attended by herself on 24 July 2007 commenced with a discussion about the extension of her hours, it did not conclude after that discussion. Mr Wake asked Ms Russell if he could question her about another matter.

[25] Mr Wake had been advised by Ms McCloy that Diane had said Ms Russell was undertaking some work for her husband's security business (ADT). Ms McCloy had also been advised by Mr Lidgett that he had observed Ms Russell locking some gates to a recreational area in an ADT marked vehicle and wearing an ADT uniform but I am not satisfied that the evidence supports Mr Wake was aware of Mr Lidgett's complaint.

[26] Mr Wake said that in order to avoid identifying Diane he made a statement that made it sound like more than one person had observed Ms Russell driving for a competitor. I find that he used words along the lines that she had been *witnessed/observed working for ADT*. Mr Wake advised Ms Russell that this was a breach of her employment agreement because it was a conflict of interest.

[27] Ms Russell said in her evidence that she asked Mr Wake for information about who had seen her driving. Mr Wake said there was no such request during the meeting and that evidence is supported by Ms McCloy. Having considered the evidence, I find it more likely that Ms Russell concluded that it was probably the First Security mobile patrolmen who saw her and she made a comment at the meeting to that effect. Ms Russell explained that because she did drive her husband's business vehicle for personal use on occasions, that may have led to the belief. I think it likely that Ms Russell did ask Mr Wake to confirm whether it was in fact the patrolmen who saw her, but no confirmation or otherwise was forthcoming from Mr Wake as to who it was who witnessed her driving.

[28] There is a dispute as to how the meeting ended. Mr Wake, and his evidence is supported by Ms McCloy, said that he told Ms Russell that he accepted her explanation. Ms Russell does not accept that, and her evidence is that Mr Wake told her that her contract had been breached and that the meeting then closed. Ms Russell said that she had not been given any information as to who allegedly had seen her working for ADT and that she felt shocked. She said that she believed that she was about to be fired for breaching her contract. The evidence did not support that there was any discussion about disciplinary outcomes or further processes that may be followed in relation to the allegation.

[29] I turn first to consider whether there was a breach of duty by First Security in raising an allegation in the way that it did that Ms Russell had been observed working for a competitor. I do find that First Security was justified in raising with Ms Russell

an allegation with respect to her working for a competitor. There was a basis for doing so. Diane had made a complaint in which, amongst other matters, she had referred to Ms Russell advising her she had been doing some of her husband's patrols. Ms McCloy had also been advised by Mr Lidgett that he had seen Ms Russell working for ADT.

[30] There were several matters, however, in terms of the conduct of the meeting in relation to the allegation that fell short of the standard one would expect of a fair and reasonable employer. Ms Russell had no warning that Mr Wake was to be present at the meeting or that such an allegation was to be put to her. She was not advised to bring a representative or to have a support person with her. A fair and reasonable employer would have made sure that Ms Russell was properly informed in advance about the allegation and advised to have a representative or some support. The allegation was also put to Ms Russell at a time when she would have been very disappointed following advice that her hours were not to be extended. Mr Wake was furthermore not properly armed with full knowledge of who had made the allegation and was not forthcoming to Ms Russell about what he knew. He deliberately framed the allegation in a different way to avoid identifying Diane. Whilst there may have been sound reason for wanting to do that given that Diane had commented on some difficulties in her working relationship with Ms Russell, it was very difficult for Ms Russell to properly answer the allegation.

[31] I do not find that the evidence supports, however, that there was any suggestion at the end of the meeting on 24 July that Ms Russell's position at First Security was in jeopardy, would not continue or that the matters in terms of the allegation would be taken further. In that way the meeting is distinguishable from those cases where unacceptable alternatives are put to an employee or there is a suggestion that an employee resigns, making such a resignation reasonably foreseeable. I find it is more likely than not that any reference to a breach of contract by Mr Wake was on the basis that working for a competitor was a breach of Ms Russell's employment agreement and a conflict of interest rather than it being presented as a decision or conclusion that she had breached her employment.

[32] There is a dispute about whether Mr Wake made it clear that he accepted Ms Russell's explanation. Ms Russell's resignation letter does not refer to a belief

that she had, or would be, dismissed. The letter was expressed as a concern about further allegations and accusations about a conflict of interest.

[33] These matters when considered in the round support that it is more likely than not that Mr Wake did accept the explanation that Ms Russell drove her husband's car in her own time, which may have accounted for concern that she was working for another competitor.

[34] The main reason Ms Russell resigned from her employment was because of the allegation made at the meeting that she was working for a competitor or that she had been observed working for a competitor and in that way there is a causal link between the allegation being made and the letter of resignation. It is less clear that there is a causal connection between the resignation and the way Ms Russell was advised of the allegation of conduct at the meeting at which she was advised.

[35] Although I have found that the procedure adopted and conduct of the meeting on 24 July was not that which a fair and reasonable employer would adopt, I do not find that there were breaches of sufficient seriousness during the meeting to make it reasonably foreseeable that Ms Russell would resign after the meeting. I accept the submission of Mr Mulholland that there were other options available to Ms Russell. One of the options was to ask First Security whether there would be any further action or investigation in terms of the matter.

[36] I have also considered whether it was fair and reasonable for First Security to accept Ms Russell's resignation. In the circumstances in which it was given, I consider that it was both reasonable and understandable for First Security to accept it.

[37] In conclusion, Ms Russell's claim for unjustified constructive dismissal does not succeed and is dismissed.

***Was Ms Russell's employment or conditions affected to her disadvantage by unjustifiable actions of First Security?***

[38] Ms Russell says that she was disadvantaged by unjustifiable actions of First Security as a result of the way in which the meeting was conducted on 24 July 2007 and because of actions after she resigned but during her notice period during meetings on 25 and 26 July 2007.

[39] I have found that there were, because of the process adopted by First Security at the meeting on 24 July 2007, unjustifiable actions in terms of the test in s.103A of the Employment Relations Act 2000. Objectively assessed and considering the actions, they were not what a fair and reasonable employer would have done in the circumstances.

[40] It is then necessary to consider whether Ms Russell's employment or conditions of her employment were affected to her disadvantage by unjustifiable actions that took place during that meeting. It is not enough that actions be unjustifiable. The actions must relate to disadvantage in Ms Russell's employment or one or more conditions thereof.

[41] Although there was unfairness in the procedure adopted, I have not found that the breach was of sufficient seriousness to sustain a claim of unjustified constructive dismissal. I am not satisfied that the unjustifiable actions at the meeting on 24 July 2007 disadvantaged Ms Russell in her employment or conditions thereof. The situation may well have been different if First Security had proceeded further with the allegations that Ms Russell was driving for ADT.

[42] On 25 July 2007, Ms Russell emailed Ms McCloy and said that she had taken the conversation the previous day under advisement. She asked for the name of the person who had seen her patrolling for another company. Ms McCloy forwarded the request on to Mr Wake.

[43] Mr Wake telephoned Ms Russell on the morning of 26 July 2007 to arrange a meeting that afternoon. Mr Wake had obtained some advice from Mr Mulholland as to whether there was a requirement to reveal the source of the allegation. Mr Wake said he received advice that he was not required to reveal the source of the information as the matter was going no further in terms of any disciplinary action. Ms Russell was not able to meet with Mr Wake on 26 July 2007 but an arrangement was made between them for a meeting the following day.

[44] Ms McCloy then received a complaint from the client at CEC, Lyn Murphy, that Ms Russell had been discussing her employment situation with CEC staff and advising them that First Security was treating her unfairly. Ms Murphy said in her evidence at the investigation meeting that more than a dozen people came to see her that day who were sympathetic to Ms Russell not having had her hours extended. I

accept that Ms Murphy wanted this to stop because it was disruptive and contacted Ms McCloy. Mr Wake decided that he needed to see Ms Russell about that matter as soon as possible. He asked for cover to be provided for Ms Russell at CEC to enable him to meet with her at 11.50am during her work time. Ms Murphy was able to provide a meeting room. Ms Russell was initially reluctant to meet with Mr Wake but agreed when he pointed out that it was still her work time.

[45] Ms Russell said that Mr Wake advised her that there had been a complaint from CEC that she had been bad mouthing the company and that her actions were *very unprofessional, immature and ridiculous*. Mr Wake said that he did not recall using the words *immature and ridiculous* but agreed that he used the words *unprofessional and inappropriate*. Ms Russell did not accept in the discussions with Mr Wake that she acted in the way put to her by Mr Wake.

[46] I am satisfied from the evidence that Mr Wake was reassured by Ms Russell's response that she would continue during her notice period to act in a professional way and that matter appeared to have been left on that basis. There was then some discussion about other matters, most of which I do not need to record except that I accept Mr Wake was left with the impression that Ms Russell had some issues to deal with outside her employment.

[47] The conversation did turn to Ms Russell's request for the name of the person alleged to have seen her driving for ADT. Ms Russell said that Mr Wake simply refused to tell her. Mr Wake said that he advised Ms Russell that he accepted her explanation about how she could have been seen to be working for ADT and that as no disciplinary action would be taken it was not appropriate/necessary to reveal the details.

[48] I consider it more likely and therefore prefer Mr Wake's evidence that he did advise that there would be no disciplinary action. I have reached this conclusion because Mr Wake had asked for advice on how to deal with the request for the name or names of the witness. I accept that he was given advice that as the matter would not be taken further there was no requirement to provide this name and it would be most unlikely that he would not have provided that explanation to Ms Russell.

[49] Although one can understand that Ms Russell would have been upset that the name was not disclosed I do not find that she could have been said to have been

disadvantaged by this non-disclosure in all the circumstances or that the non-disclosure was unjustified.

[50] I am of the view that it was reasonable of Mr Wake to act promptly to deal with the client's concern. When one examines how the meeting was conducted on 26 July, I accept that some of the procedures were less than perfect but there was no disciplinary outcome for Ms Russell at the end of the meeting and I am not satisfied that she was disadvantaged by the way it was conducted or by the failure to provide the name of the person who said that she was working and/or witnessed her working for a competitor.

[51] About two hours after the meeting on 26 July, Mr Wake was telephoned by Ms McCloy. Ms McCloy said that she had received another complaint from Ms Murphy and a request that Ms Russell be removed from the site as her conduct was disruptive and that Mr Russell had telephoned to talk to Ms Murphy which she considered unprofessional and unacceptable.

[52] Mr Wake asked for advice again from Mr Mulholland. Mr Wake was advised that, as a result of Ms Russell's action, it was appropriate to consider suspending her for the remainder of her notice period. The suspension checklist was completed by Mr Wake which included a tick beside the question whether the allegation was potentially one of serious misconduct. A meeting was arranged with Ms Russell at the offices of First Security at 11.30am on 27 July 2007. Prior to that meeting, Ms Russell was asked not to attend at CEC. Ms Russell was not advised to bring a representative or support person with her to the meeting. Ms Russell was concerned when she arrived at the offices of First Security that she was asked to sign in and wear a visitor's label. I accept that this was less than satisfactory but the evidence satisfies me that this was a recent new procedural change which was not directed specifically at Ms Russell.

[53] When Mr Wake put the concerns of Ms Murphy to Ms Russell, she denied that she had bad mouthed First Security. In terms of her husband's telephone call, Ms Russell advised that he was only attempting to help. I find that the issue of suspension and/or garden leave was then discussed for the balance of Ms Russell's notice period.

[54] Ms Russell did not accept that any other options were put to her and I accept her evidence on that, although with three weeks until the end of her notice period there could well have been some difficulties in a short term placement. I also accept that Ms Russell whilst not objecting to the suspension felt that she simply had no choice.

[55] I find that the evidence supports that First Security suspended Ms Russell in terms of clause 35 of her agreement rather than, as seems to be suggested in Mr Mulholland's submission, placing her on leave under clause 38.3 of her agreement. Clause 38.3 provides that the employer may, at its sole discretion, elect to pay remuneration in lieu of the employee having to work out the relevant notice period. Had that clause been used in the circumstances, then I would have expected Ms Russell to have simply been paid in full for the balance of her notice period and there would have been no need for any discussion about her conduct. She could have left in a dignified manner. It is further clear from a letter dated 5 September 2007 from Mr Mulholland that Ms Russell was considered to have been suspended for the balance of her notice period.

[56] The employment agreement enables suspension of an employee pending a full investigation for misconduct. There was no evidence of any further investigation about what took place that had led to Ms Murphy advising she had not wanted Ms Russell back to work at CEC.

[57] First Security was also obliged to consider and reach conclusions about Ms Russell's conduct. The evidence did not support that this was done in a fair way. The conduct complained of following the meeting on 26 July was that Ms Russell's husband had attempted to telephone and talk to Ms Murphy on one or two occasions and that Ms Murphy had heard Ms Russell make a comment about her in passing which I find in all probability was along the lines that *now Lyn has made a complaint about me*. Mr Russell's actions are not, in my view, ones that a fair and reasonable employer would conclude were the responsibility of Ms Russell. The other matter was simply a comment in passing which would not on its own constitute misconduct.

[58] I conclude that suspension, in the circumstances, was unjustified. A fair and reasonable employer would have considered other options at the time and if there were no other options have paid Ms Russell out for the balance of her notice period under clause 38.3. Instead, I find that the matter was treated as one of alleged

misconduct and a suspension was considered. Ms Russell suffered disadvantage as a result because her employment ended under the clear impression that she had acted in a way that justified her placement on suspension for the balance of her notice period.

[59] In conclusion, I find that there was one unjustified action that caused Ms Russell disadvantage in her employment. That was her suspension on 27 July for the balance of her notice period. Ms Russell gave evidence about the impact that the events of 24, 26 and 27 July 2007 had had on her. I am required to have regard only to the final meeting and the advice that she had been suspended at that meeting. As best as I am able, I have assessed the hurt and humiliation relating to that meeting.

[60] In assessing compensation, I have taken into account that Ms Russell had resigned and cannot therefore be compensated for the loss of her role, at least from 24 August 2007. I have also taken into account that Ms Russell started a new role at New World Supermarket on 2 August 2007 and as a result did not suffer financial hardship. I have also taken into account that it was almost inevitable that Ms Russell would have had to have remain outside of the workplace as CEC did not want her on its premises and there were really no other options.

[61] Notwithstanding that, it is quite clear from the evidence that Ms Russell was humiliated and was left with the clear impression and rather confused as to why she was responsible for the events that gave rise to the suspension. I accept from Ms Russell that it must have appeared to her to be one cause for complaint on the part of First Security after another.

[62] In all the circumstances, I am of the view that a suitable award for compensation is the sum of \$2,000.

[63] I have carefully considered the issue of contribution. I do not find, properly assessed, that Ms Russell contributed in any way to the decision to suspend her for the balance of the notice period. She was not responsible for her husband's attempts to contact Ms Murphy and I am not satisfied that comments she made about Ms Murphy were such that amounted to misconduct in all the circumstances for which her award should be reduced.

[64] I order First Security Guard Services Limited to pay to Nicola Russell the sum of \$2,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 without deduction.

[65] In my view, Ms Russell also has a justifiable complaint that she was not paid for the last week of her notice period until after the Authority's investigation meeting. Ms Russell's employment agreement with First Security provided, under clause 38.2, that she was entitled to wages and leave on termination. There may well have been some administrative issues as to why payment was not made, however, any such issue does not, in my view, satisfactorily explain why there was such a long period of time before this payment was made.

[66] I think the most satisfactory way to deal with the matter is to make an award of interest on that sum, making some allowance for administrative issues. I order that from 1 October 2007 until the wages were eventually paid into Mr Henderson's trust account on 1 October 2008 interest shall be payable on the sum of \$304.29 at the rate of 5%, which is not more than 2% above the 90 day bill rate at the date of this determination.

***Were there breaches by Ms Russell of her employment agreement and, if so, should a penalty be awarded?***

[67] First Security says that Ms Russell breached clauses 25.1, 25.2 and 25.3 of her individual employment agreement. These provisions relate to restraint of trade but also deal with conflicts of interest. First Security say that Ms Russell breached clause 24 in terms of non-solicitation.

[68] Ms Russell denies working for a competitor. She says that any discussion with Diane about Diane doing some work for her husband was said in a joking way *a silly throw away jest*.

[69] I turn to the standard of proof required to be discharged in terms of establishing a breach for a penalty claim. There are many employment cases where the Court has held there must be proof beyond reasonable doubt of a breach where a penalty is sought. In *Xu v. McIntosh* [2004] 2 ERNZ 448 at 459, Goddard CJ stated, being clearly aware of judicial expressions to the contrary, that:

*In all instances, that is to say in both the personal grievance and the penalty action, the standard of proof required to be obtained to discharge the relevant burden of proof is the standard applying in all civil cases; proof on a balance of probability ...*

[70] I have considered whether there is proof of a breach on the balance of probabilities, but in doing so there needs to be clear evidence that there was a breach for a penalty claim.

[71] I accept the evidence that Ms Russell in all probability talked to Diane about working for ADT. I found Diane to be a straightforward witness and there was no reason, in my view, why she would not have been truthful about that matter. Diane made it clear to Ms Russell that she was not interested in working for ADT and although she said she felt some pressure from Ms Russell, the matter ended there. Diane's concern it seemed to me in raising the matter was more about Ms Russell's attitude following her refusal. I am not satisfied, from considering clause 24, that such an exchange was a breach because there was no attempt for Diane to cease doing business with First Security. I am not satisfied that even if it could be considered a breach, which given the wording in that clause I consider unlikely, it is a breach for which a penalty should be awarded.

[72] The evidence about Ms Russell working for ADT came both from Diane who said that Ms Russell told her that she was working for her husband, and from Mr Lidgett who put what he observed into a written statement. Diane accepted that she had never seen Ms Russell driving for ADT. I find that there were times when Ms Russell made statements to Diane which were not altogether true. Possibly this reflected some of the difficulties that she was experiencing outside of her work. In those circumstances and, given Ms Russell denies ever driving for ADT, I am not satisfied that the evidence from Diane alone is sufficiently clear that Ms Russell breached the provisions of her individual employment agreement.

[73] Mr Lidgett made a written statement that he saw Ms Russell on Sunday 15 July when he was out and about with a friend, getting out of the car in an ADT uniform and locking the gate of a picnic area.

[74] The evidence I heard from Ms Russell, her father and her husband was that Ms Russell was otherwise engaged on that day and that she did not drive or work for ADT. Again, I am not satisfied that the evidence is clear so that I can find there has been a breach of Ms Russell's obligations under her employment agreement and impose a penalty.

[75] I dismiss the counterclaim in its entirety.

**Costs**

[76] I reserve the issue of costs.

[77] I would encourage the parties to reach agreement as to costs. Failing agreement, Mr Henderson has until 13 February 2009 to lodge and serve submissions as to costs and Mr Mulholland has until 27 February 2009 to lodge and serve submissions in reply.

[78] I apologise to the parties for the time it has taken to release this determination. The delay was largely as the result of two personal events which were outside of my control.

**Summary of findings and orders made**

- I have not found that Ms Russell was unjustifiably constructively dismissed.
- I have found only one unjustifiable action that disadvantaged Ms Russell and that was her suspension and I have ordered First Security to pay to Nicola Russell compensation for that in the sum of \$2000 without deduction under s 123 (1)(c)(i) of the Employment Relations Act 2000.
- I have ordered First Security to pay interest at the rate of 5% on one week's wages in the sum of \$304.29 from 1 October 2007 until 1 October 2008.
- I have dismissed the counterclaim.
- I have reserved the issue of costs and have encouraged the parties to attempt to reach agreement on costs failing which there is a timetable for exchange of submissions.

Helen Doyle  
Member of the Employment Relations Authority