IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 225
5393141

	BETWEEN	GLEN KYLE Applicant
	AND	DIGITECH SERVICES LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Courtney Walker, Counsel for Applicant Simon Schofield, Advocate for Respondent
Investigation Meeting:	23 April & 3 May 2013 at Auckland
Submissions received:	7 May 2013 from Applicant 7 May 2013 from Respondent
Determination:	4 June 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Glen Kyle, claims that he was unjustifiably dismissed by the Respondent, Digitech Services Limited (DSL) during a meeting held on 26 July 2013.

[2] Mr Kyle is claiming unjustifiable disadvantage in that DSL did not provide him with a written employment agreement and required him to use annual leave when he did not wish to do so.

[3] Mr Kyle further claims that DSL breached the duty of good faith set out in s.4 (1A)(b) of the Employment Relations Act 2000 (the Act) by not being active and constructive in maintaining a productive employment relationship.

[4] DSL denies that Mr Kyle was unjustifiably dismissed or unjustifiably disadvantaged in his employment.

Issues

[5] The issues for determination are whether:

- Mr Kyle was unjustifiably disadvantaged by DSL
- Mr Kyle was unjustifiably dismissed by DSL
- DSL breached the duty of good faith it owed to Mr Kyle

Background Facts

[6] DSL, which specialises in embroidery, digital print and screen printing, has approximately 17 employees. Mr Kyle, who was employed by DSL as an Applicator, initially commenced employment on a casual basis and transferred to permanent employment with effect from 21 June 2010.

[7] Mr Kyle was employed subject to an individual employment agreement (the Employment Agreement) which had been signed by him and Mr Graeme Casey, Managing Director of DSL. The date adjacent to the signatures is typewritten as 18 June 2010.

[8] Mr Kyle recalled being given the Employment Agreement and that he had been told to take the Employment Agreement home overnight to read it, and agreed that he had briefly read it, however he did not agree that the Employment Agreement had been signed on the date indicated on it. Mr Casey said he believed the date of signing to be correct.

[9] The Employment Agreement states:

> ***15. TERMINATION OF EMPLOYMENT***
>
> *one week's notice of termination shall be given in writing by either party of (sic) where the notice period is not given the notice period shall be paid in lieu thereof or forfeited in lieu of notice.*
>
> ***16 ABANDONMENT OF EMPLOYMENT***
>
> *Where you absent yourself from work for a continuous period of 3 days without our consent, or without notification to us, or without*

good cause, you shall be deemed to have terminated your employment, unless special circumstances exist.

17 REDUNDANCY

Where your employment is to be terminated because you have become redundant, the following provisions shall apply:

You shall be entitled to 1 weeks' notice of termination of your employment where you have less than 12 months current continuous service and 3 weeks where you have more than 12 months current continuous service.

Provided that in any case we may elect to pay you wages in lieu of the appropriate.

18 PERSONAL GRIEVANCES/DISPUTES

We consider it desirable that any disputes over the interpretation, application or operation of the contract or any grievance that you may have be resolved as quickly as possible at the place of work between ourselves.

[10] Mr Kyle said his relationship with Mr Casey had been good prior to 26 July 2012, although he had not known him very well, and he confirmed at the Investigation Meeting that he had enjoyed the job prior to 26 July 2012

[11] Mr Casey said that he had believed he and Mr Kyle had a reasonably good relationship prior to 26 July 2012, and confirmed that he had been aware that Mr Kyle suffered from an anxiety disorder. Mr Casey said he had understood the anxiety disorder to have been the reason that Mr Kyle, who had previously owned his own business and then held employment as sales representative, had accepted the less stressful position of Applicator at DSL.

[12] Mr Casey said he had also been aware that Mr Kyle had started a business, Yes Promotions Limited, during his employment with DSL, and said he had encouraged Mr Kyle in this by offering support and allowing him to take time off to attend trade fairs and visit potential customers for his new business venture.

[13] Mr Kyle agreed that Mr Casey had been aware of Yes Promotions Limited, but said that he had attended one trade fair only and that he had taken annual leave to do so.

[14] On Thursday 26 July 2010Mr Casey said that he had decided to have an informal chat with Mr Kyle because he had had a significant amount of time off work, and there had been some recent quality issues with his work.

Meeting on 26 July 2012

[15] Mr Kyle said he had been downstairs in the factory when Mr Casey had approached him and asked to have chat with him in his office which was located upstairs, but he had not been told the reason for the meeting.

[16] Mr Casey's office was located in an open plan office area, and two other employees, Ms Nardia TeAukura and Mr Steve Robinson, worked in close proximity to the table at which Mr Casey and Mr Kyle had their discussion.

[17] Mr Kyle said Mr Casey had commenced the meeting by making an observation as to how quiet business had been, and had then proceeded to tell him that his performance had deteriorated and that because he had been making a number of mistakes, he had been performing less well than the other Applicator. Mr Kyle agreed that he had made one definite error, but as regards any others, said he had just followed the job sheet instructions.

[18] Mr Kyle agreed at the Investigation Meeting that he had had numerous job interviews in the preceding 12 months prior to 26 July 2012, and that he had told Mr Casey he had previously had a job interview with Pacific Brands Limited (Pacific Brands) although he had not been offered a job on that occasion. However he had told Mr Casey that he had been asked to attend an interview in connection with another position with Pacific Brands which was to be held on Tuesday 31 July 2012.

[19] Mr Kyle said Mr Casey had commented that he needed to think about what to do in the business in light of the low level of work available, and 'that someone would need to go'. Mr Kyle said he had then asked Mr Casey what he wanted him to do, and Mr Casey had told him to come into work the following day, Friday 27 July 2012, when he would be given a letter outlining their discussion, and that as from Monday 30 July 2012, his employment would become casual in nature. Mr Kyle said that the meeting ended with Mr Casey telling him that he would be paid any accrued annual leave.

[20] Mr Casey said the primary reason for the meeting with Mr Kyle on 26 July 2012 had been to discuss Mr Kyle's continual absences from work, and some quality issues associated with his work.

[21] Mr Casey said that the meeting had commenced with a general discussion about the slowdown in the work and had proceeded to discuss quality issues with Mr Kyle's work. Mr Casey said Mr Kyle had said in respect of one mistake he had made that he had not had his mind on the job at the time.

[22] Mr Casey said a discussion then followed about Mr Kyle's many absences from work, and that Mr Kyle had informed him that he had not been absent from work on the Monday of that week due to a migraine as Mr Casey believed, but that he had in fact been at a job interview.

[23] Mr Casey said that Mr Kyle had told him about the previous interview with Pacific Brands, and that he had a further interview on Tuesday 31 July 2012.

[24] Mr Casey said that he had proceeded to discuss the current level of work at DSL and that he would need to think about what to do in the future if work continued at that level. Mr Casey said Mr Kyle had agreed and observed that the low workload was the reason he had been applying for other jobs.

[25] Mr Casey said he had suggested to Mr Kyle that there was a solution to suit both his (Mr Kyle's) and DSL's needs, this being a casual working arrangement whereby Mr Kyle could attend interviews as he wished, and DSL could call upon his services as required.

[26] Mr Casey said he had told Mr Kyle to go home and think about the suggestion overnight, and if he found the suggestion to be still appealing the following day, Friday 27 July 2012, he was to confirm this in order that a casual working agreement could be drafted and employment on a casual basis commence with effect from Monday 30 July 2012.

[27] Mr Casey denied telling Mr Kyle during the meeting that he would be paying out his annual leave payment, and said that at the conclusion of the meeting Mr Kyle appeared to be happy with the casual employment suggestion and excited about the forthcoming interview with Pacific Brands.

Ms TeAukura's evidence

[28] Ms TeAukura said she had been present in the office during the whole of the meeting between Mr Casey and Mr Kyle on 26 July 2012 and had been able to overhear the conversation clearly.

[29] Ms TeAukura said the tone of the conversation had been casual "*like mates talking"*. Ms TeAukura said she had heard Mr Kyle telling Mr Casey that he had been looking for other employment, and that she had been quite shocked by an employee telling his employer that he had been looking for alternative employment.

[30] Ms TeAukura also confirmed that she had heard Mr Casey discussing the mistakes in Mr Kyle's work and Mr Kyle saying that "*his head was just not in it"*. Ms TeAukura said there had also been some discussion about how quiet the work at DSL had been and Mr Casey suggesting that a casual contract might be something for Mr Kyle to consider and to let him know what he thought of the suggestion by the end of the following day.

[31] Ms TeAukura said her impression had been that towards the conclusion of the meeting the tone of the conversation had become more casual.

Mr Robinson's evidence

[32] Mr Robinson said he had also been present in the office during the meeting between Mr Casey and Mr Kyle on 26 July 2012. Mr Robinson said he had overheard Mr Kyle discussing his having applied for other jobs, but he had not been surprised at this as some time prior to the meeting Mr Kyle had told him that he had been looking to reduce his working hours to 3 or 4 days a week.

[33] Mr Robinson said the meeting had discussed Mr Kyle moving to casual employment, and there had been open and frank discussion about this. Mr Robinson said his impression had been that Mr Kyle had been receptive to the suggestion of casual work, but that there was to be a meeting the following day as the matter had not been concluded.

[34] Mr Robinson confirmed that from the conversation he had overheard, Mr Casey had not terminated Mr Kyle's employment during the meeting, nor had he heard Mr Casey say that he would pay Mr Kyle's annual leave entitlement.

[35] Mr Kyle confirmed at the Investigation Meeting that Mr Casey had told him to go home and think about the casual employment suggestion overnight.

[36] Mr Kyle said that he may have appeared to be in agreement with the suggestion that he transfer to a casual employment basis, however this could be attributed to his anxiety disorder and the fact that he could not deal with confrontation.

[37] Mr Kyle said that despite the fact that he had been told to go home and think about the casual employment suggestion overnight, when he had left the meeting he had the firm

impression that his full-time employment had been terminated, and the only alternative had been for him to accept the casual employment suggestion.

[38] Following the meeting on 26 July 2012 Mr Kyle said he had telephoned his wife and told her that he had lost his job, and had also told other employees that he had been laid-off.

[39] Ms Kyle said that when Mr Kyle had informed her that he had been laid off, she had asked him if he was sure that was correct, because she had been aware, through her own work experience, of the process that should be followed. Ms Kyle said Mr Kyle had assured her it was correct, and that he would be working on a casual basis with effect from Monday 30 July 2012.

[40] Ms Kyle said her impression had been that Mr Kyle had been extremely anxious and very distressed, and she had advised him to attend for work the next day, Friday 27 July 2012.

Events following the meeting on 26 July 2012

[41] Mr Casey said that although Mr Kyle had not confirmed his acceptance of the casual working suggestion, he had believed Mr Kyle to be in agreement with the suggestion and he had sent an email to some of the employees to advise them of what had occurred. The email dated 26 July 2012 stated:

> *As a direct result of the current low level of print work, I have decided to move Glen to a casual employee role. He has agreed and therefore effective Monday 30th July he will be a casual employee. When we need him to work we will need to contact him at least one day in advance on his mobile number. As a casual employee he retains the right to reject any work offered and is not bound to do any particular number of hours, please bear this in mind.*
>
> *I will confirm this with a new contract which I will present to him tomorrow.*
>
> *He will work today and tomorrow as per normal and then on a 'as-required' basis after that.*

[42] Mr Kyle said that after the meeting he had informed his supervisor, Ms Roxanne Smith, he had not felt able to face his fellow employees on the day following the meeting, and he had not attended for work on Friday 27 July 2012.

[43] Mr Casey said he had been informed by Ms Smith on the following day, Friday 27 July 2012, that Mr Kyle had told her that he would not be returning to work at all, and that Mr Kyle had also contacted other employees to advise them that he had been laid off.

[44] Mr Casey said he had called and left a message on Mr Kyle's mobile telephone asking him to call him, and asking why he had told other employees that he had been laid off when this was not accurate. In the message Mr Casey had said:

> *Not sure why you're not at work today, thought you were coming into work today. Phil said you were laid off, it's not exactly accurate mate. Can you let me know what is going on.*

[45] Mr Casey said he had expected Mr Kyle to respond to this message as he had responded to similar voice messages on previous occasions; however Mr Kyle had not done so.

[46] Mr Kyle explained that because he had been on medication on Friday 27 July 2012, he had not heard the mobile telephone or realised there was a message on it.

[47] Mr Casey said Mr Kyle had also not turned up to work on Monday 30 July 2012, however because it had not been unusual for Mr Kyle to not attend work on a Monday he had not attempted to contact Mr Kyle that day as that had been the payroll processing day at DSL and he had been very busy.

[48] Mr Casey said he had instructed Ms TeAukura to process Mr Kyle's accrued holiday pay on Monday 30 July 2012 because Mr Kyle had only worked 25 hours in the previous week and he believed he would need the money. Additionally he understood Mr Kyle had agreed to move to casual employment with effect from Monday 30 July 2012, and the payroll needed to be altered accordingly.

[49] Mr Kyle said his belief that his employment had been terminated had been confirmed when he had checked his bank account on Monday 30 July 2012 and realised that his annual leave and final pay had been processed.

[50] Although Mr Casey said he had not received any response to his voice message, he had not contacted Mr Kyle on Tuesday 31 July 2012 as he knew he would be attending an interview with Pacific Brands that day; however he had intended to contact him the following day. However on Wednesday 1 August 2012 he had received an email from Ms Kyle

attaching a letter from Mr Kyle which advised that Mr Kyle was raising a personal grievance against DSL.

Raising of a personal grievance

[51] The personal grievance letter from Mr Kyle was dated 31 July 2012 and advised Mr Casey that, as a result of taking advice from Kensington Swan Lawyers, he was raising a personal grievance in respect of unjustifiable dismissal and unjustifiable disadvantage for: "*being made to take annual leave against my will".* Mr Kyle also advised that he would be seeking a penalty against DSL for non-provision of an employment agreement, and the letter concluded with an offer to attend mediation.

[52] Mr Kyle said that he had been pressurised to take time off during his employment at DSL and confirmed that he had attended numerous interviews and had used annual leave to do so, or had taken unpaid leave. However towards the end of his employment, he could not afford financially to take the time off.

[53] Mr Casey explained that the working environment at DSL was relaxed and he did not expect the employees to adhere to strict working hours, provided that they achieved the production expected of them.

[54] Mr Casey said that during times when the workload was low the employees were asked if they wanted to go home and DSL offered to pay them annual leave, however employees had never been forced to take time off or to use annual leave and if they did not wish to take time off, they attended for work as normal.

[55] Ms TeAukura confirmed that this was the usual practice.

[56] Mr Casey said Mr Kyle had never been forced to take time off and although he had been offered the opportunity to take time off, he had refused on a number of occasions and stayed at work.

[57] Mr Casey said he had been shocked by the letter dated 31 July 2012 advising that Mr Kyle was raising a personal grievance, and the accusations that Mr Kyle had been treated unfairly, as he had believed there had been mutual agreement to move to a casual employment arrangement.

[58] Mr Casey engaged the services of Employers Assistance Limited and a letter had been sent by it to Mr Kyle. The letter dated 1 August 2012 refuted the claim that Mr Kyle had been dismissed and stated:

> *Graeme says you freely discussed the possibility of moving to work on a casual basis for DSL. This proposal was to be discussed over night by you, and discussed further and finalised on Friday. This proposal was witnessed by Ms Nardia Watts* [TeAukura], *who was present at the time.*
>
> *No statement was made that you were "laid-off" or your employment had ended. There has therefore not been any dismissal. Why would Graeme dismiss you if you were considering a proposal to work casually?*

[59] The letter referred Mr Kyle to the telephone message which had been left by Mr Casey on Friday 27 July 2012, and stated that: "*In view of your misunderstanding"* he was required to return to work immediately and resume full-time employment before 7 August 2012, or he would be regarded as having abandoned his employment.

[60] The letter concluded:

> *If you decide not to return to work and you have any suggestions you wish to make please do so ASAP. It may be best for you to consider meeting with Graeme personally to collect a copy of your 2010 signed written Employment agreement and decide what you want to do from here. Any alternatives to redundancy need to be discussed.*

[61] Mr Kyle said that it was only after he had received this letter that he realised Mr Casey had tried to contact him, and he had checked his mobile phone and accessed the message left by Mr Casey on Friday 27 July 2012.

[62] Mr Kyle confirmed that on Friday 3 August 2012 he had been verbally offered, and had verbally accepted, the job at Pacific Brands for which he had been interviewed on Tuesday 31 July 2012.

[63] On Monday 6 August 2012 Mr Kyle had confirmed his verbal acceptance of the job offer with Pacific Brands by signing an employment agreement.

[64] That same day, Monday 6 August 2012 Mr Casey had sent an email to Ms Kyle attaching a letter from him to Mr Kyle. In the email Mr Casey had written:

> *Glen is required to report to work on/or before Thursday 9th August at 9.30 am. At which time we need to discuss the possibility of redundancy.*

> *Should he decide not to attend or does not contact me to arrange an alternative time, he will force us to hold a meeting in his absence.*

[65] The attached letter, also dated 6 August 2012, confirmed the meeting to be held on 9 August 2012 to discuss the possible redundancy of Mr Kyle's position at DSL. The letter invited Mr Kyle to bring a support person to the meeting, and stated that: "*Full consideration will be given to your views".* The letter concluded by inviting Mr Kyle to meet with Mr Casey immediately if there was anything in the letter about which he had been unsure.

[66] By letter also dated 6 August 2012, Kensington Swan responded on Mr Kyle's behalf to the Employer's Assistance letter of 1 August 2012 reconfirming the personal grievance and suggesting a meeting between the parties with a view to resolving the issues.

[67] Mr Kyle said that he had commenced employment with Pacific Brands on 8 August 2012 as a Retail Shop Manager on a full-time basis.

[68] Mr Casey said that because Mr Kyle had not returned to work, had not participated in the proposed redundancy consultation process and had continued to maintain via Kensington Swan that his employment had been terminated by DSL on 26 July 2012, he believed that the only course of action available to DSL was to terminate Mr Kyle's employment by reason of redundancy on 10 August 2012.

Determination

Was Mr Kyle unjustifiably disadvantaged by DSL?

[69] Mr Kyle is claiming unjustifiable disadvantage in relation to the meeting held on 26 July 2012. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

> *That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[70] The elements of s103 (1) (b) are:

a. An action

b. The action was unjustifiable

c. The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[71] Mr Kyle had been requested at very short notice to attend a meeting with Mr Casey on 26 July 2013 but had not been informed of the reason for the meeting. Mr Casey stated the primary reason for the meeting had been to discuss Mr Kyle's continual absences from work, and some quality issues associated with his work.

[72] The reasons for the meeting as stated by Mr Casey are disciplinary matters, and although the Employment Agreement does not incorporate a disciplinary procedure I note that at clause 2 it states that: "*The employer shall act as a good employer in all dealings with the employee.*"

[73] Whilst I accept from the evidence given that the working environment at DSL was casual in nature, I consider that Mr Kyle should have been advised in advance of the meeting of the allegations against him, have been given the opportunity to obtain representation, and to have been provided with a full opportunity to provide an explanation after having duly considered the allegations.

[74] However DSL failed to advise Mr Kyle of the nature of the meeting, and consequently deprived him of the opportunity for representation and a considered explanation, which I consider not to have been acting as a good employer in accordance with clause 2 of the Employment Agreement, and thereby to have disadvantaged Mr Kyle.

[75] Moreover the meeting, which I have found to be disciplinary in nature, took place in an open office area where other employees could, and did, overhear the conversation between Mr Casey and Mr Kyle. Whilst I appreciate that DSL did not have an area in which such a disciplinary meeting could take place in privacy, I consider that privacy could have been afforded by having the meeting and discussion held off-site.

[76] The discussion about the downturn in work and the possible need to address this situation preceded the discussion about the quality issues associated with Mr Kyle's work and his level of absenteeism. It was within this context that the suggestion about Mr Kyle transferring to casual employment took place.

[77] A change from permanent to casual employment would affect Mr Kyle's terms and conditions of employment to his disadvantage given that by its very nature, casual employment, unlike permanent employment, carries no guarantee of regular work and associated income.

[78] Whilst I find that there had been no final decision made at the meeting on 26 July 2012 since this was to be confirmed after Mr Kyle had the opportunity to consider the suggestion overnight, I find that a good and reasonable employer would not have conducted a disciplinary meeting which included a suggestion that the employee change his employment status without following a fair and reasonable process, and holding the meeting in private. However DSL had failed to do so.

[79] I determine Mr Kyle was unjustifiably disadvantaged in relation to the meeting on 26 July 2012.

Was Mr Kyle unjustifiably dismissed by DSL?

[80] Mr Casey's evidence that Mr Kyle's reaction was positive about the casual work suggestion, I find to be credible in light of the fact that Mr Kyle had indicated that he would be attending a job interview following the meeting on 26 July 2012, and had attended numerous job interviews during the period of his employment with DSL which had necessitated his taking significant time off work.

[81] I also find Mr Casey's evidence that the matter had not been concluded at that meeting but that Mr Kyle was to think about it overnight and confirm the following day if he wished to accept it, to be supported by the evidence not only of Ms TeAukura and Mr Robinson, but by that of Mr Kyle himself who confirmed at the Investigation Meeting that he was told by Mr Casey to think about the casual working suggestion overnight.

[82] I also note that although the email sent by Mr Casey to the other employees following the meeting on 26 July 2012 clearly indicated that it was his understanding that Mr Kyle had agreed with his suggestion that he move to a casual basis, and in fact details the work procedures to be followed, it also states that the casual employee role will be confirmed within a new contract which was to be offered to Mr Kyle the following day: "*I will confirm this with a new contract which I will present to him tomorrow".*

[83] I accept that the reason the email does not contain an alternative to the casual working suggestion was that Mr Casey was convinced that Mr Kyle had accepted the casual working suggestion, albeit that he was to think about it overnight. I note that there is no mention or indication of the termination of Mr Kyle's employment in the email.

[84] On the basis of that evidence, I do not find that Mr Kyle had been dismissed from his full-time employment on Thursday 26 July 2012, but rather that he had been presented with

the option to either continue in full-time employment or to transfer to casual employment which he was to consider overnight and discuss at a meeting to be held when he attended for full-time work the following day.

[85] Mr Kyle said he had believed his full-time employment to have been terminated during the meeting on 26 July 2012. I have considered whether or not Mr Kyle's underlying anxiety disorder could have resulted in Mr Kyle's claim that he had misunderstood the import of the meeting and believed that his employment had been terminated during that meeting.

[86] I find no grounds for this because in her evidence Ms TeAukura said that her impression had been that towards the end of the meeting the tone of the conversation had become more casual: "*like mates talking",* and Mr Kyle had confirmed that he understood he was to think about the casual employment proposal overnight.

[87] I consider it is therefore necessary to examine the succeeding events to determine whether Mr Kyle had been unjustifiably dismissed by DSL after the meeting on 26 July 2012 or whether his employment ended in some other way.

[88] I find that the duty of good faith as set out in s.4 of the Act is relevant when considering the subsequent course of dealings between the parties:

> ***4. Parties to employment relationships to deal with each other in good faith***
>
> *(1) The parties to an employment relationship specified in subsection (2)-*
>
> *(a) Must deal with each other in good faith; and*
> *(b) Without limiting paragraph (a), must not, whether directly or indirectly, do anything-*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other,*
>
> *(1A) The duty of good faith in subsection (1)-*
>
> *(a) is wider in scope that the implied mutual obligations of trust and confidence, and*
>
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a*

productive employment relationship in which the parties are, among other things, responsive and communicative.

[89] The duty of good faith applies equally to both parties and has as its object the maintenance of a productive employment relationship.

[90] Following the meeting on Thursday 26 July 2012 Mr Kyle had been expected by Mr Casey to return to work the following day. However he had not done so after informing his supervisor Ms Smith that he had not felt able to face his fellow employees on the day following the meeting.

[91] On Friday 27 July 2012 Mr Casey had been made aware that Mr Kyle considered that he had been 'laid-off' the previous day, and he had immediately telephoned Mr Kyle with the intention of correcting any possible misunderstanding. I find this to have been "*responsive and communicative"* and the action of a fair and reasonable employer.

[92] Mr Casey left a telephone message on Mr Kyle's mobile telephone with the expectation that Mr Kyle would return the call once he had accessed the message. I find that this was a realistic expectation on Mr Casey's part given that he had previously left messages in this way and had received a timely response[1].

[93] I find that the fair and reasonable employer would have made further attempts to contact Mr Kyle in the event that there was no timely response to the telephone message, although I accept that Mr Casey did not attempt to contact Mr Kyle on Tuesday 31 July 2012 as he knew Mr Kyle would be attending a job interview at Pacific Brands.

[94] The decision by Mr Casey to pay Mr Kyle's accrued annual leave in order to assist Mr Kyle financially in accordance with previous practice, I find to have had the unfortunate effect of adding to the misunderstanding held by Mr Kyle that his employment had been terminated during the meeting on 26 July 2012.

Personal Grievance letter dated 31 July 2012

[95] It is apparent that as a result of the meeting on 26 July 2013 and the payment of his accrued annual leave that Mr Kyle had sought legal advice and raised a personal grievance in the letter dated 31 July 2012. In the letter, which had been sent to Mr Casey attached to an email from Ms Kyle dated 1 August 2012, Mr Kyle stated that:

a. The failure by DSL to provide him with an employment agreement was a breach of s. 65 of the Act;

[1] *Canterbury District Health Board v National Union of Public Employees* [2002] 2 ERNZ 15

b. He had been forced to take annual leave against his will which constituted an unjustifiable disadvantage; and

c. DSL had breached the duty of good faith in respect of the termination of his full-time employment

a. Non-provision of an employment agreement

[96] In respect of the first claim that DSL had failed to provide Mr Kyle with an employment agreement, I observe that an employment agreement has been accepted into evidence which had been signed by Mr Kyle and is dated 18 June 2010.

[97] Moreover at the Investigation Meeting Mr Kyle confirmed that he recalled being asked to take the Employment Agreement home overnight, and that he had looked through it prior to signing it.

[98] Mr Kyle disputed that the Employment Agreement had been signed on the date indicated next to the signatures, but offered no alternative date, and indeed had stated that he had not been provided with an Employment Agreement.

[99] Mr Casey stated that he had believed the date typed on the Employment Agreement to be correct, and I find his evidence to be the more reliable on this issue.

[100] On this basis, I find there had been no breach of s.65 of the Act.

b. Taking of annual leave

[101] In respect of the second claim, Mr Casey stated that employees were not at any time forced to take annual leave although he confirmed that DSL had a practice of asking employees if they wanted to use annual leave when the available work load was light and allowed for this. This practice is in line with clause 11 of the Employment Agreement which states: "*... annual holidays shall be taken at such times as mutually agreed upon ..".*

[102] At the Investigation Meeting Ms TeAukura confirmed the practice, and said that it was optional for an employee to take annual leave if they wanted the time off. Mr Casey's evidence was that Mr Kyle had never been forced to take time off and had turned down such a request on a number of occasions and stayed at or attended for work. I find this assertion to be supported by a text message exchange between Mr Kyle and Ms Smith dated 2 July 2012 provided in evidence which states:

Hey glenn its rox, wont need you tomorrow as we do not have much on, I will call u around 10 if we need you hpe that is ok

Hi rox, no its not ok I don't have any leave days to use I need to come in to earn a living

Ok c u in the morning

[103] Whilst I do not consider it is best practice for employers to request employees to take annual leave to, in effect, assist with an employer's financial position, I do not find that the evidence supports Mr Kyle having been forced to use his annual leave if he did not wish to do so, and so I find that there was no unjustifiable disadvantage.

c. Breach of good faith in relation to the termination of full-time employment

[104] In respect of the third claim of breach of good faith in relation to the termination of Mr Kyle's full-time employment and associated claim of unjustifiable dismissal, I find it significant that the Personal Grievance letter dated 31 July 2012, the same date that Mr Kyle attended a job interview at Pacific Brands, does not seek reinstatement and requests that the parties attend mediation rather than meeting together to see if the matter could be resolved.

[105] Whilst the letter refers to DSL having breached the good faith requirement in failing to maintain:´... *an active and constructive employment relationship"* I observe that Mr Kyle had sought legal advice in the first instance rather than seeking a meeting with DSL in accordance with clause 18 of the Employment Agreement which states that personal grievance matters be resolved: "... *as quickly as possible at the place of work between ourselves"* .

Response letter dated 1 August 2012

[106] Upon receipt of this letter Mr Casey consulted Employers Assistance Limited which responded to Mr Kyle by a letter dated 1 August 2012. The letter stated clearly that there had been no dismissal and referred to a misunderstanding by Mr Kyle, and to the telephone message which had been left on Mr Kyle's mobile telephone. The letter also required Mr Kyle to resume his full-time employment before 7 August 2012.

[107] Mr Kyle said that following receipt of this letter he had accessed the message from Mr Casey on his answer phone. Despite this, and the expectation as set out in clause 18 of the Employment Agreement that matters be resolved in-house, there was no response from Mr

Kyle to this letter prior to 6 August 2012, by which date Mr Kyle had been verbally offered and accepted, and had signed the offered employment agreement, with Pacific Brands.

[108] Mr Kyle confirmed at the Investigation Meeting that he had attended 'numerous' job interviews prior to the meeting on 26 July 2012. There is no duty on employees to disclose an intention to leave the employer's service as confirmed by counsel in *Rooney Earthmoving Ltd v McTague*[2] citing *UBS Wealth Management (UK) Ltd* [3]an English case in which it was stated by Justice Openshaw:[4]

> *[E]mployees who are considering taking up alternative employment are under no obligation to their existing employers to disclose ongoing negotiations unless and until a clear agreement is made with the prospective employer ...*

[109] However once an offer of employment has been made by a third party and accepted by the employee, the situation changes. Although in accordance with s 65 of the Act a written agreement is required, it is accepted that new employment can start with an oral agreement and is not conditional upon a written agreement[5].

[110] I find that when Mr Kyle accepted the offer of employment with Pacific Brands on 3 August 2012, which was to commence on 8 August 2012, this action had acted as a termination of his employment with DSL, even though he had not informed DSL, or offered notice to DSL in accordance with clause 15 of the Employment Agreement.

[111] I consider that Mr Kyle was obligated pursuant to s 4 (1)(b) of the Act to act in good faith by not doing anything to mislead or deceive DSL. In particular I consider he was under a duty to disclose that he had accepted, and in fact commenced, alternative employment which confirmed that he no longer wished to be: "*active and constructive in ... maintaining a productive employment relationship*" with DSL.

[112] The actions undertaken by both parties from that point onwards are irrelevant as I find the employment relationship had ended on 3 August 2012 when Mr Kyle had accepted the verbal offer of employment with Pacific Brands, which he had confirmed on 6 August 2012 by signing a written employment agreement.

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[2] [2009] ERNZ 240 (EMC)
[3] [2008] IRLR 965 (QB)
[4] Ibid as para [24]
[5] *Warwick Henderson Gallery Ltd v Weston* [2006] 2 NZLR 145 (CA)

[113] I further find that the communication on behalf of DSL on this date underpins the belief held by DSL that it considered it had an on-going employment relationship with Mr Kyle.

[114] I determine that Mr Kyle effectively terminated his own employment with DSL when he accepted the offer of employment with Pacific Brands and therefore DSL did not unjustifiably terminate Mr Kyle's employment.

Did DSL breach the duty of good faith owed to Mr Kyle?

[115] I have observed that the duty of good faith as set out in s.4 of the Act is a two-edged sword. Whilst I have found that DSL unjustifiably disadvantaged Mr Kyle in respect of the meeting on 26 July 2012, I have also found that Mr Kyle did not act in good faith during the succeeding events which culminated in his acceptance of employment with Pacific Brands.

[116] Accordingly I see no further need to address this issue.

Remedies

[117] Mr Kyle has been unjustifiably disadvantaged and is entitled to remedies.

[118] DSL is ordered to pay Mr Kyle $2,000.00 compensation under s123(1) (c) (i) of the Act in respect of the unjustifiable disadvantage grievance.

Costs

[119] In respect of this determination, costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, submissions may be filed by the parties within 28 days of the date of this determination

Eleanor Robinson
Member of the Employment Relations Authority