IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 321/09
5164540

	BETWEEN	DENNIS KAVANAGH Applicant
	AND	ASCOT ALUMINIUM LIMITED Respondent

Member of Authority:	Dzintra King
Representatives:	Richard Upton, Counsel for Applicant Richard Gee, Advocate for Respondent
Investigation Meeting:	22 July 2009
Submissions Received:	3 August 2009 from Applicant 30 July 2009 from Respondent
Determination:	7 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Dennis Kavanagh, the applicant, says that he has been unjustifiably dismissed by the respondent, Ascot Aluminium Limited ("Ascot" or "the company").

[2] Mr Kavanagh says he has not been paid holiday pay and three days' wages. He says there have been breaches of his employment agreement in that no notice period was given and his vehicle was removed from him.

[3] He seeks payment of the holiday pay and wages and penalties for breach of the Holidays Act and Wages Protection Act. Claims were penalties for breaches of the employment agreement were dropped.

[4] Ascot says that there was no dismissal: Mr Kavanagh resigned.

[5] Mr Kavanagh commenced employment with Ascot Aluminium Limited as a sales executive signing a written employment agreement on 4 September 2006. He dealt with commercial and residential joinery requirements and was responsible for estimating, selling and project management of all the clients' requirements. When he commenced employment at Ascot the company was owned by Mr Bruce Larmer. The company was sold to Jocelyn and Aaron Ghee in October 2007. Mr Kavanagh signed a letter on 18 October 2007 maintaining his entitlements. His salary at the time of dismissal was $62,400 per annum.

[6] Both parties accepted that there were some difficulties in the employment relationship with tension between the areas of production and sales. Mr Richard Gee, the Sales and Marketing Manager, accepted that he had not raised any matters regarding Mr Kavanagh's performance on a formal basis.

3 March 2009

[7] Shortly after midnight on the morning of 3 March Mrs Raewyn Kavanagh started getting severe pains in her legs. Mr Kavanagh took her to hospital and they did not get home until after 3am. Despite being very tired, Mr Kavanagh went to work at the normal time, starting at 7.20am. At about 9am Mr Gee approached him and told him he had made a measuring error. Mr Kavanagh accepted that that was so. He said Mr Gee reacted by saying "*it isn't just a measuring problem*". Mr Kavanagh said he did not believe it was going to lead to a formal discussion, but realised it was going to lead to something difficult. He felt burdened down with constantly struggling to get items through production and was also fed up with clients contacting him about jobs that were not done on time. Furthermore, he was very tired from the previous night. He did not want to have a discussion at that stage.

[8] Mr Kavanagh said to Mr Gee "*This is not working out. I may need to start to look for another job*". Mr Gee then got up and left immediately without saying anything further. Mr Kavanagh said that he made those comments because he felt that, for whatever reason, Mr Gee was going to try to blame him for the company's issues. He also felt that Mr Gee's comments indicated that he no longer supported him and that to a large extent he would be on his own.

[9] Mr Kavanagh said that despite making those comments, he had no desire to leave his employment at that time. He could not afford to do so. He and his wife

relied on the income that he received from Ascot to survive. His wife had recently been made redundant.

[10] That afternoon, at about 2pm, Mr Kavanagh received a telephone call from Mr Aaron Ghee, a major shareholder who provided advice and briefings to Mr Gee, on the work landline. He said Mr Ghee called him relatively frequently. Mr Kavanagh thought he valued his contribution to the business. Mr Ghee told him that Mr Gee had been telling him that Mr Kavanagh intended looking for another job. He said Mr Ghee specifically asked him not to do that and said that any other person coming into the role would have the same problems that he had encountered and he thought that would be completely wasteful. He made it very clear that he wanted Mr Kavanagh to stay at Ascot. Mr Ghee said he was in Singapore but would be back in about a week's time and would talk to him further on his return. Mr Ghee denied saying he did not want Mr Kavanagh to resign and said he had told Mr Kavanagh to deal directly with Mr Gee rather than complicate matters by involving Mr Ghee. Mr Kavanagh said he explained to Mr Ghee that there had been a misunderstanding and that he was not leaving. Whether or not Mr Ghee said he did not want Mr Kavanagh to resign I am satisfied that Mr Kavanagh told him he was not intending to resign.

5 March 2009

[11] On 5 March 2009 Mr Gee delivered a letter to Mr Kavanagh stating that he had accepted his resignation. This letter reads:

> *Dear Dennis*
>
> ***RE: MUTUAL AGREEMENT ON YOUR EMPLOYMENT***
>
> *It is agreed between us that your employment will cease as per the terms in your contract.*
>
> *We will assist you with finding a new job role and you will assist us in managing your client's projects and chasing sales.*
>
> *Thank you for your cooperation.*
>
> *Yours truly,*
>
> *Richard Gee*
> *SALES AND MARKETING MANAGER*

[12] Mr Kavanagh said he explained that he had not resigned. He told Mr Gee that he had been tired at the time of the conversation and also told him that he was not intending to leave, especially as Mr Ghee had asked him to remain. Mr Kavanagh said Mr Gee seemed to note his comments and said he would not be left without a job. He took this to be an assurance that his employment was secure and believed that the matter was settled. Mr Gee said Mr Kavanagh did not say he had not resigned. I prefer Mr Kavanagh's evidence.

23 March 2009

[13] Mr Kavanagh received an email from Mr Gee with the subject heading "*the plan for your next move*." The email read:

> *Denis You finish up your current sales role at end of month 31st March. You will hand over a full brief of where jobs are at that stage.*
>
> *You go on holiday for the month of April paid by us as you have only 7 days holiday pay left, to refocus and to get yourself sorted out and then come back to me after April end to communicate what you can do. You will decide what job role you want in the future and can take another job role with your skills elsewhere, but first sort out the personal issues that have effected [sic] your work quality as agreed.*
>
> *Thanks*

[14] On 25 March Mr Kavanagh responded with the following email:

> *Yesterday I received your email dated Monday 23rd March 2009 9.15am.*
>
> *I want it clearly noted that I have not resigned from this position. Therefore why has this contract been deemed to have to have expired on 31st March 2009? and on what grounds?*

[15] Mr Gee replied by email the following day stating:

> *RE: continued employment*
>
> *Incorrect Denis in our discussion about the problems associated with you re mistakes, and communication of unacceptable behaviour it was offered by you and accepted by me that you would leave, before we terminated your employment.*
>
> *Given the problems with every job you have handled over the last 12 months and the frequent mistakes we would have many grounds for dismissal, we have instead chosen to work with you to help you for the future which will not be in your present role within Ascot.*
>
> *It was agreed we would assist you and give you time to look for a job role, and we have done so with allowing you to have the Month of*

April to sort your issues and we have gone further in offering to discuss with you your situation at the end of April.

[16] Mr Kavanagh replied stating:

In regard to the letter dated 5th March 2009 please note the following.

On receipt of that letter and further discussions between you and myself, and subsequent discussions between Aaron and myself, you were informed that the words spoken by me were made under duress and that my intention was to remain employed with Ascot Aluminium Ltd. No formal resignation was offered by me at that, or any other time.

Numerous further discussions between yourself, and also Aaron both from Singapore and at the firms staff picnic led me to believe that there was a clear understanding that my position was not under threat and that I played an important role within the organisation.

Please make available to me by cease of business Tuesday 31st March 2009 copies of all correspondence relating to me, a full copy of my employment file, and a copy of the Company Employment policy document

Regarding the email sent dated Monday March 31st 2009 I have no alternative other than to do as you request and take the company's paid leave for the month of April, and I will resume duties on Friday May 1st 2009.

[17] Mr Gee replied stating:

The status is:
You cannot carry out your current role of sales, project manager, and measurements without making mistakes that cost the company $money, we have supported you by adding staff, and setting meetings to review your jobs, yet the mistakes are still happening. Every job you have organised has had mistakes for the last 12 months. You have resigned.

A choice for us is to cease your employment immediately based on the above:
After discussion with you we have elected to support you to find out what the personal issue is for you and try and get your problem sorted, this is fair and reasonable. To do this your role will have to be replaced with a salesperson who can do the job spec immediately.

You will spend April trying to sort yourself out and determine what is wrong by visiting medical specialists, and then we will meet again to determine what role you can fulfil if any. We then have two options: cease employment or arrange alternative employment in a different role or situation whichever suits the problem solving. You will not have use of the company vehicle during this time.

Try to find out what has caused the problem and then we can move forwards.

[18] It later emerged that the company had, without Mr Kavanagh's knowledge or consent used his remaining annual leave as part payment for that month.

[19] Mr Kavanagh commenced the hand over of his duties as directed. He did this on the basis that at the end of that period of leave he would be returning to his normal duties.

[20] Soon after going on leave, Mr Kavanagh underwent a CT scan and blood tests. His doctor advised him on 7 April that there was nothing physically wrong and attributed any memory or concentration problems that might exist to workplace stress.

[21] On 22 April Mr Kavanagh advised Mr Gee of the medical results and they agreed to meet on 30 April.

Meeting on 30 April

[22] Mrs Kavanagh attended the meeting and took notes. Mr Kavanagh said he pushed Mr Gee to provide details of the new role that was purportedly available to him but Mr Gee did not do so. He felt that his preference was for Mr Kavanagh to leave. A perusal of Mrs Kavanagh's notes, which I accept as an accurate rendition of the meeting, bears out that view.

[23] Mr Kavanagh said no clear result eventuated from that meeting other than his being left with the clear impression that Mr Gee did not want him in the company. He could not work out why given that during the meeting, Mr Gee accepted several times that there were concerns about the performance of the company and that those concerns were not solely Mr Kavanagh's responsibility. Mr Kavanagh said he felt he had two choices. He could resign, which he felt the company clearly wanted him to do, or he could return to his normal work. Because he still wished to know about the new role that had been mentioned before he made a decision, he emailed Mr Gee on 3 May about this, seeking further details. Mr Kavanagh wrote:

> *Hi Richard,*
>
> *Following up from our meeting at 3.00pm on the 30/4/2009 can you please put together your proposals based on the two outcomes we discussed at the meeting.*
>
> *1: The sales role you spoke about with Ascot Aluminium Ltd?*
>
> *2: The exit package you talked about?*

> *I do feel very hurt and humiliated about how my employment relationship with Ascot Aluminium has been handled, but I do want to work with you to move forward. As per our discussion on Thursday I am also assuming I am on full pay until we can resolve the situation.*

[24] Mr Ghee replied at 6pm that evening stating:

> *You had full discussion at our last meeting. Just decide what you want to ask to do and talk with me Monday.*
> *As suggested the best solution based on the situation is to move on with a new career for you.*
>
> *As recognised there is too much history that affects you & Ascot and remember you resigned as well.*
>
> *Best result is you search out new role for your skills, and focus on that.*
> *I suggest that discussion on how the situation with you has been handled is not conducive to moving forward, given the very reasonable manner & time given to you to sort yourself out. I have not detailed the extensive uncovering of problems with current and past jobs either. Remember the catalyst for this was mistakes and errors which have been considerable to date and the loss $$$ factor for Ascot is considerable. Let's move forward while there is the chance.*

Involvement of Representatives

[25] On 4 May Mr Kavanagh instructed an advocate, Ms Sandra de Kock. She emailed Mr Ghee to try and arrange a meeting to resolve matters. In the email she stated:

> *I have reviewed the various communications and notes of meetings and discussions including a recording of the most recent meeting that Dennis had with your Sales Director, Richard Gee, and believe there is strong evidence to suggest that Dennis is being terminated without cause. I note than Dennis has repeatedly confirmed that he has NOT resigned his position; however the company would seem intent on progressing as if he had Furthermore the company has advertised Dennis' position on trademe.co.nz on the 5th of March, the date a letter was given to Dennis advising him that his employment with the company would cease.*

[26] She asked Mr Ghee to contact her. Mr Ghee did not reply to any of the communications addressed to him. The reply email from Mr Gee is interesting. The subject is "*you have advised you have decided to seek legal support*." The email reads:

> *Accordingly you are reminded of your resignation effective beginning of March 2009.*

> *Your salary has immediately ceased as of today taking into account your 4 weeks' notice period as per contract.*
>
> *No further discussion will be held on options for you or your advisers for the future.*
>
> *Your employment has ceased due to your resignation as a result of errors raised with causing the company serious documented losses.*
>
> *You are reminded of the mistakes and serious errors of judgment brought to your attention and admitted by you in our discussions.*
>
> *Your garden leave has been taken as notice given to you as per your contract.*

[27] This email was not copied to Ms de Kock. The assertion that the four weeks' notice provided in the employment contract had been fulfilled by the four weeks' notice was news to Mr Kavanagh. He said he was astounded to receive that email. He had done nothing to warrant being dismissed and he had not resigned.

[28] On 6 May Mr Kavanagh emailed Mr Gee and tried to organise a mediation with the Department of Labour. The response from Mr Gee was as follows:

> *RE: RECORDS/LEAVE/MEDIATION*
>
> *You should read your contract.*
>
> *First you have to write to us outlining any issues you have this has not been done.*
>
> *Then we reply once we have this from you.*
>
> *Then if we can't agree you can consider going to the Labour dept for any mediation not before.*
>
> *If you follow the contract rules thanks this will be resolved.*

[29] On 12 May Mr Kavanagh emailed Mr Gee saying that he was passing the matter over to the Labour Department for mediation and had a date available. Mr Gee replied saying that he had not agreed to mediation so Mr Kavanagh could not pass anything over or get them to attend any meeting. He did, however, say that there were some available dates.

[30] On 12 May Mr Gee wrote to Mr Kavanagh stating:

> *RE: Department of Labour Mediation Hearing*
> *I spoke with the dept person and advised we reject the offer for mediation as there is not details to mediate as nothing has broken down in our discussions.*

> *We advised at our last meeting you to provide:*
>
> *(a) Your grievance details.*
> *(b) your proof of the medical findings after your month off.*
> *(c) your skills offer based on what you think you can do.*
> *(d) your settlement for termination if different from your contract [4 weeks]*
>
> *Once we have that we can meet and discuss with you what will be acceptable, and then if required we can mediate. Via dept of labour or whomever.*
>
> *You have still to do the above.*
>
> *You still have the opportunity to meet and discuss the final termination agreement.*
>
> *You have the opportunity to construct a sales agency agreement to represent Ascot/Commercial glass/Azzuro if you wish to as well.*

[31] On 12 May Ms de Kock emailed Mr Gee stating, unsurprisingly, that she was extremely confused about his behaviour regarding the matter, and that he had been most inconsistent throughout. She noted that he had seen her email to Mr Ghee so was well aware of the nature of the grievance. She nonetheless offered to have a discussion with him to see if was possible to resolve matters. Mr Gee replied to Ms de Kock on 12 May stating:

> *Denis' employment has been terminated by his own resignation in March following many months of discussion about performance and mistakes and the discussions and assistance given to him since we were to help him adjust to his future, we have invited discussion with him to determine whether he can have a future with Ascot but he failed to suggest how he can contribute, he has agreed that he needs to find another role in his life, and the support he has had from Ascot has progressed him towards that fact. He states that he has no medical reasons for his problems so it must be lack of skill.*
>
> *As you are aware there is a process he has to follow if he is unhappy which he has yet to do. Ascot has always been fair and reasonable in supporting him and will continue to do so. I will sort out copies of his records this week and make them available at our next meeting with Denis.*
>
> *There is no breakdown when there is nothing being asked to negotiate about.*

[32] At this stage, Mr Kavanagh instructed a lawyer, Mr Richard Upton, who wrote to Mr Ghee on 28 May notifying a personal grievance. He noted that Mr Kavanagh's employment had been terminated on 5 May but the company had not paid him his wages between 30 April and 5 May. Since he had been dismissed, he had been made aware that Ascot had deducted 12 days of annual leave from his leave balance during

his period of purported garden leave. He has not been provided with the one month's notice due under his employment agreement. Mr Upton requested payment of the wages between 30 April and 5 May, the payment of the month's notice under his employment agreement, and the 12 days of annual leave.

[33] In an email dated 1 June Mr Gee stated the annual leave was a mistake and would be fixed. He also asserted that Mr Kavanagh had made serious mistakes resulting in over $,300,000 losses and that he was banned from key construction sites. The respondent did not file a counterclaim against Mr Kavanagh and I have no evidence regarding the veracity of these allegations. Mr Gee stated that Mr Kavanagh should have been terminated for his mistakes in August 2008 or earlier and that he had been treated fairly but could not be helped as he did not have the ability.

[34] On 11 June Mr Upton telephoned Mr Gee about the mistake regarding the deduction of annual leave. He noted that he had pointed out that there was no lawful reason for the company to withhold the payment, given that it had accepted that that had occurred by mistake. Mr Gee accepted that and agreed that the annual leave should be paid. He made a commitment to have the company pay the balance in the next pay run being 15 June 2009.

[35] However, by 17 June this had not occurred and Mr Upton wrote to Mr Ghee, asking for a written response from the company as to why it refused to make the payment, given it had accepted its actions were unlawful.

[36] On 18 June Mr Richard Gee wrote to Mr Upton stating:

> *As you are aware Mr Kavanagh had lodged a claim with the Employment Relations Authority dated 4th June 2009 regarding his employment relation problem.*
>
> *We are now awaiting for the outcome of this before any further payments are made to Mr Kavanagh.*

[37] On 19 June Mr Upton wrote to Mr Ghee saying that there was no legal ability for the company to continue to withhold wages or holiday pay and that the withholding was only compounding Mr Kavanagh's distress. He asked that the company make those payments as a matter of utmost priority. He also suggested, sensibly, that the company obtain specialist employment law advice.

[38] On 20 June Mr Gee emailed Mr Upton:

Please note your client has:

(a) secured employment at a similar business and has been approaching his old customers at Ascot
(b) has approached employees of Ascot offering them jobs
(c) has communicated to APL our major supplier negative comments about Ascot
(d) has communicated to customers negative comments about Ascot

I suggest you reign in his unacceptable behaviour.

My shareholders instructions to me are to communicate:

Your client has been less than truthful with all the claims he made to date and he is not in distress.
He has already got employment for over 2 weeks now and has been defaming our company in the marketplace and tries to interrupt the production of Ascot aluminium works by poaching our staff and getting them to leave Ascot's company to join another.

We will resolve all matters in mediation.

We are considering personal claims against him personally because we have also discovered that the damages he has caused the company have far reaching repercussions which we are experiencing now.

As a company staff his action constitute gross negligence by causing significant losses to the company.

I will not consider any interim payments before mediation

[39] Mr Kavanagh said that he found this email very hurtful. He knew nothing about the comments or why the assertions had been made. He had been honest in his dealings with Ascot while employed there and subsequently and had done nothing to harm Ascot's reputation or to solicit staff.

[40] On 26 June, Mr Upton responded by writing to Mr Aaron Ghee saying that the assertion that his client was less than truthful was extremely upsetting, that Mr Kavanagh had made numerous attempts to secure employment but had not secured employment with anyone let alone in a similar business and in any event Mr Kavanagh had no restraint in his employment agreement. He said Mr Kavanagh remained without income and that was one of the reasons why they had been urgently trying to obtain the wages.

[41] The parties were scheduled to attend mediation on 3 July. The respondent did not attend and the mediation had to be rescheduled to 16 July.

[42] On 20 July I held a conference call with the parties. In the course of that discussion, I raised the issue of the refusal to pay holiday pay. Mr Gee refused to pay the holiday pay. I informed him that that was not a wise decision. Despite this, Mr Gee persisted in that course of action.

Was there a resignation?

[43] The employment relationship terminated on 5 May. The company attempted to justify its actions on the basis that he had resigned on 3 March.

[44] The employment agreement provides that:

> *Either party may terminate the agreement by giving one month's notice in writing.*

[45] Mr Kavanagh did not put anything in writing.

[46] Turning to the question of whether he resigned verbally or not it is well established law that, to be relied upon, a verbal resignation must be clear, unequivocal and unambiguous.

[47] In *Boobyer v. Good Health Wanganui*, unreported, WEC3/94, 24 February 1999, Goddard CJ dealt with the issue of resignation. He referred to cases like *Sadd v Iwi Transition Agency* [1991] 1 ERNZ 438 where there was an equivocal communication, the employee learned that the employer has misunderstood it as a resignation contrary to the employee's intention but did nothing within a reasonable time to correct the employer's false impression. In a case like that the employee must suffer the adverse consequences of standing by passively and letting the employer think that a resignation had taken place.

[48] In this case there was not an equivocal communication. Even if it had been equivocal, Mr Kavanagh corrected the impression held by Mr Gee as soon as he became aware of it.

[49] Another type is illustrated by *NZ PSA v LandCorp Limited* [1991] 1 ERNZ 741.

> *That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so, or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and*

> *should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once 'the heat of the moment' had passed and taken with it any 'influence of anger or other passion commonly having the effect of impairing reasoning faculties': Chicken and Food Distributors (1990)Ltd v Central Clerical Workers Union [1991] 1 ERNZ 502, 507.*

[50] The words uttered by Mr Kavanagh do not constitute a clear and unambiguous resignation. They made no reference to the notice period and the term "*resignation"* or anything with a similar meaning was not used.

[51] During the hearing Mr Gee accepted that the words were expressions of dissatisfaction: that is all they were. It does not make sense for Mr Kavanagh to have resigned. He had no alternative employment. He and his wife relied on his income to make ends meet.

[52] Mr Kavanagh's evidence is that when he was handed the letter he told Mr Gee that he had not resigned. Prior to that he had indicated to Mr Ghee that he was not resigning. From then on he consistently maintained that position. Despite this, the company has steadfastly maintained that a resignation was given and Mr Kavanagh's attempts to clarify his position were simply ignored. Mr Gee's closing submissions went so far as to assert, incorrectly, that when questioned during the hearing Mr Kavanagh agreed that he had resigned.

[53] Mr Kavanagh did not give a clear and unambiguous resignation verbally nor was any resignation given in writing. He applicant did not resign and the respondent's insistence that he had done so was unjustified.

Was the dismissal justified?

[54] Given that I have found that Mr Kavanagh did not resign his employment was terminated at the initiative of the employer.

[55] In April 2009 the company imposed a month of "garden leave" upon Mr Kavanagh. There is no provision for garden leave within the agreement nor was there any discussion with him about it. The "garden leave" was in fact a suspension carried out without substantive justification and without due process. Moreover,

Mr Kavanagh understood that he would return to his role at the conclusion of that leave and made that very clear in an email

[56] In response to questioning, Mr Gee told me that the dismissal was as a direct result of Mr Kavanagh involving an independent adviser and that was why he had removed him from the payroll. Mr Gee asserted that at that point the company no longer had an obligation to be fair and cooperative. This is incorrect. An employee's choosing to contact an advisor does not relieve the employer of its good faith obligations. Mr Gee's action in dismissing Mr Kavanagh because he had sought advice and representation is a breach of good faith and would have added to Mr Kavanagh's distress.

[57] There were no substantive grounds justifying dismissal. There was no fair process followed. Mr Gee accepted at the hearing that he had not had a meeting with Mr Kavanagh at which he advised Mr Kavanagh of his ability to bring representation, of the allegations that the company was making and the sanction that was being considered.

[58] Mr Gee made assertions regarding Mr Kavanagh's alleged non-performance. Those allegations are disputed by Mr Kavanagh. Any performance issues are irrelevant to my determination. The company followed no proper process whatsoever to arrive at any conclusions of non-performance.

[59] Furthermore, Mr Gee in his brief of evidence said that the company accepted that it had not supported Me Kavanagh's role adequately with good production and installation management. It is evident from the minutes of the meeting of 30 April that the company accepted that while there were difficulties, those were attributable not just to Mr Kavanagh but also to other people within the company. At that meeting Mr Gee accepted that:

> *Not all the blame was Dennis. Its not Dennis' fault.*
>
> *Things at Ascot were not being done right.*
>
> *We are not saying you have to get out of here because we had lost money.*
>
> *The finger should not have been pointed solely at Dennis it should have been pointed more widely.*

[60] I am unable to conclude that the alleged performance concerns were established. They cannot be relied upon as constituting contribution under s.124.

[61] I find surprising the fact that the issue of workplace stress was raised in the report from the doctor yet this was totally ignored by Mr Gee. Mr Gee made derogatory comments about the medical profession and stress stating: *"doctors are clowns" and "doctors will say that your cat is suffering from stress if you ask them to.*" It is clear that Mr Gee did not regard any form of psychological illness as constituting a reason for any workplace difficulties.

[62] Section 103A of the Employment Relations Act 2000 sets out the test of justification, namely:

> *The question of whether a dismissal or an action was unjustifiable must be determined on an objective basis when considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time that the dismissal or action occurred.*

[63] The employer's actions were not the actions of a fair and reasonable employer in the circumstances. Mr Kavanagh was unjustifiably dismissed.

Effects of Dismissal

[64] Mr and Mrs Kavanagh gave evidence during the hearing about the effects that the dismissal had had on Mr Kavanagh. Evidence was also produced regarding a very large number of positions for which Mr Kavanagh had applied. He had applied for approximately 60 jobs at the time that he wrote his brief of evidence. Mr Kavanagh is 62 years of age. They had to cancel insurances and try to rearrange health insurance (part of which had been paid by the company), and sell numerous items on TradeMe to meet bill payments and bank interest charges. Relatives had helped with food parcels. Mr Kavanagh no longer played golf. Although he was passionate about the sport, he was reluctant to play as it was standard for the loser to shout drinks and he was unable to do that. They had been forced to rely on their family by way of groceries and assistance which he found very humiliating.

[65] In February Mr Kavanagh and his wife had booked to go to their son's wedding in London in August. They were the only members of the family who were able to attend. Ascot knew of that commitment as he had made a request for leave for that period. They had made a commitment to contribute financially to their son's

wedding. They had had to go back on that commitment which had been extremely embarrassing. The commitment was now being met by his son via a bank loan. They were still attending the wedding, but his son had promised them that while they were in London he would provide them with pocket money which Mr Kavanagh assumed was coming from the bank loan his son was getting. He said it made him feel very uncomfortable having to receive handouts from his children. Mr Kavanagh also felt very worried that when in London they might not be able to pay for dinners and drinks when they were out with their daughter-in-law and her parents.

[66] Mr Kavanagh said that he had originally felt very angry about how he had been treated by Ascot, but that had now changed to worry and anxiety about the future. He always seemed tired, his sleeping patterns had been affected and he had no desire to do any projects about the house which was what he used to love doing.

[67] The dismissal had affected Mr and Mrs Kavanagh's ability to socialise as they had no money. It was very embarrassing to tell people that his employment had been terminated, which also made him want to stop socialising.

[68] Mr Kavanagh was also very upset about the allegations made regarding his honesty and integrity.

[69] Mr Kavanagh said he continued to have no clarity about why he had been dismissed and why he had not been paid. He felt extremely badly let down by the company that he had worked extremely hard for over a period of time and that he wanted to keep working for. He found the whole situation completely humiliating and left him at probably the lowest emotional point of his life.

Remedies

Loss of income

[70] Mr Kavanagh has lost remuneration as a direct consequence of his dismissal. At the time of the investigation meeting, he had earned only $1,400. He had made attempts to obtain employment elsewhere but had been unsuccessful in doing so. His age and recent history of working in one specialist industry for such a long time are significant factors counting against him. The impact of the company's actions towards his reputation in the industry also cannot be overlooked.

[71] Mr Upton submitted that Mr Kavanagh could have reasonably have expected to continue working for the company until his retirement in at least five years' time. He earned $62,400 per annum at the time of the dismissal. He was a member of KiwiSaver and received a 2% employer contribution. He also received a medical insurance policy subsidy valued at approximately $45 per month. He had use of a company vehicle.

[72] Before I turn to a consideration of loss of future earnings, pursuant to s 123 (1) (b) Mr Kavanagh is entitled to be reimbursed for the income lost from the date of dismissal to the date of the hearing. He would have earned $13,440. From that the earnings of $1,400 are to be deducted leaving an amount of $12,040. The respondent is to pay that amount to the applicant.

[73] Mr Upton asked that three years' salary be awarded for loss of future earnings. He referred to *Telecom New Zealand Ltd v. Nutter* [2004] 1 ERNZ where the Court of Appeal considered that in assessing the period of reimbursement the contingencies of life, the possibility of alternative employment, the unemployment benefit and the need for moderation needed to be considered.

[74] In *Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711 Court held that there was no right to be paid either the whole or part of one's career expectancy. Payment was discretionary.

[75] In *Prebble v Coastline FM Ltd* [1992] 3 ERNZ 294 the Court indicated that consideration should be given to what constitutes a reasonable period and that the contingencies of life needed to be allowed for.

[76] Given Mr Kavanagh's age and the difficulty he has had in obtaining other employment, I am satisfied that this is a case where it is fair and equitable to consider an award for loss of future earnings. Set against his expectation of working for a longer period until he retired must be the possibility that ill health or a justified dismissal may have truncated that period. There were concerns being expressed about his performance; however, there were also admissions regarding inadequate support for Mr Kavanagh and problems regarding other areas of the business operation. Mr Kavanagh may obtain other employment. He produced references from other people in the aluminium business. Against this must be set his inability to do so at the time of the hearing despite many attempts.

[77] Taking the matters I have considered into account Mr Kavanagh is to be paid 9 months' salary pursuant to s 123 (1) (c) (ii). This is $46,800.00.

Compensation under s.123 (1) (c) (i)

[78] The circumstances surrounding Mr Kavanagh's dismissal and the significant impact it had had on him justify a significant compensatory award.

[79] Mr Upton sought an award of $25,000.

[80] The allegations made by the employer regarding Mr Kavanagh's honesty, the decision to dismiss made as a result of Mr Kavanagh's decision to seek advice and assistance and the reaction to the suggestion of mediation are all factors pointing to a high award.

[81] The respondent is to pay the applicant the sum of $15,000 pursuant to s 123 (1) (c) (i).

Company vehicle

[82] The employment agreement provided Mr Kavanagh with the use of a company vehicle. The agreement provides that the company reserves the right to use the vehicle as a pool vehicle during ordinary working hours and that private use is not permitted.

[83] The respondent removed Mr Kavanagh's use of a company vehicle from the time it put him on "garden leave." Mr Upton submitted that the unrestricted use of a company vehicle constituted an implied term of his employment agreement. The vehicle had never been removed from him before for any reason. He had enjoyed full personal use of this vehicle and the company had met costs.

[84] Mr Gee confirmed that it had never raised any issue with Mr Kavanagh about how he used the company vehicle previously.

[85] Mr Upton submitted that the removal of that vehicle throughout April and beyond constituted a breach of a term of employment and asked that an award be made under s.123(1)(c)(ii). He sought $60 per week being the value of the personal fuel costs associated with using that vehicle that had previously been met by the company.

[86] The criteria for the implication of terms were authoritatively re-stated by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363; 52 ALJR 20 (PC), cited with approval in *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 (CA) and *Prudential Assurance Co Ltd v Rodrigues* [1982] 2 NZLR 54 (CA). The term contended for must:

(1) Be reasonable and equitable; and

(2) Be necessary to give business efficacy to the contract, this meaning that no term will be implied if the contract is effective without it; and

(3) Be so obvious that "it goes without saying"; and

(4) Be capable of clear expression; and

(5) Must not contradict any express terms of the contract.

[87] The term contended for – private use of the vehicle – does not meet the criteria for the implication of terms, as it contradicts an express term. No award can be made for the loss of use of the vehicle because its removal does not constitute a breach of the employment agreement.

Contribution

[88] There is no contribution.

Breach of the Holidays Act 2003

[89] Mr Gee accepted that normally annual leave is paid in the pay run following termination. The company failed to pay annual leave to Mr Kavanagh.

[90] In response to questioning, Mr Gee accepted that a decision was made in early May not to pay Mr Kavanagh his annual leave. He also accepted that that decision was unlawful. He said under oath that once lawyers became involved there was nothing that Mr Kavanagh could have done to have his annual leave paid to him prior to a hearing.

[91] In spite of deciding unlawfully in May not to pay the annual leave, the respondent made a number of assurances that the balance would be paid on a number

of different occasions. Given what was said under oath, the company clearly had no intention of ever honouring those assurances.

[92] The company also advanced a number of differing explanations as to why this had occurred. None of those explanations was lawful. At the time of the hearing Mr Kavanagh had not been paid holiday owed him upon termination. Mr Gee then undertook, under oath, to pay the annual leave by 5pm Thursday, 24 July. However, the company did not do so. He did not receive the annual leave payment until 25 July. That was almost three months after termination.

[93] The annual leave paid to Mr Kavanagh recognised only 12 days of annual leave. A further two days which accumulated during the month of April 2009 remain unpaid.

[94] With regard to annual leave, Mr Kavanagh seeks an award of:

- Interest on 12 days annual leave ($2,880.00) from 12 May being seven days after termination until 25 July 2009 being the date of payment;
- Two days unpaid annual leave being $480 gross;
- Interest on 2 days annual leave from 12 May being seven days after termination until the date of determination.

[95] The respondent is to pay interest at the rate of 4.7% on $2,880 from 12 May 2009 until 25 July 2009; and on $480.00 from 12 May 2009 until the amount is paid in full.

Penalties for breach of the Holidays Act

[96] The applicant has sought a penalty pursuant to s.75 of the Holidays Act. The problem with this claim is that pursuant to s 76 a Labour Inspector is the only person who may bring an action in the Authority to recover a penalty under s 75.

[97] I agree with the applicant that a conscious decision was made to ignore the law. However, where a claim for a penalty has not been brought by a Labour Inspector, I do not have the jurisdiction to award a penalty.

Unpaid wages

[98] Mr Kavanagh remained an employee until 5 May 2009. It is accepted by the company that it has only paid him until 30 April. Mr Kavanagh is owed wages for the three working days between 30 April 2009 and 5 May 2009. Those days are Friday, 1 May, Monday, 4 May and Tuesday, 5 May. He was paid $62,400 per annum which equates to a daily rate of $240. He seeks an award of $720 gross.

[99] Mr Kavanagh also sought interest on the wages arrears payment. An award was sought from 12 May until the date of determination.

[100] The respondent is to pay Mr Kavanagh the sum of $720 and interest on that amount at the rate of 4.7%, the interest to run from 12 May 2009 until such time as the amount of the arrears is paid in full.

Penalties for breaches of the Wages Protection Act

[101] Pursuant to s.13 of the Wages Protection Act 1983, the Authority has jurisdiction to award a penalty for breach of that Act.

[102] The respondent deliberately failed to pay the applicant the wages that were due between 30 April and 5 May. In an email of 5 May, the company wrote: "*Your salary has immediately ceased as of today*." It is clear that the company was aware that it had to continue paying the applicant until that date as the employee remained an employee until then.

[103] The company's actions were deliberate and ongoing and Mr Gee was well aware of the impact on Mr Kavanagh of not paying the wages. The applicant seeks a penalty of $10,000.

[104] A penalty of $2,000 is to be paid into the Authority and then into the Crown bank account.

Penalties for breach of employment agreement

[105] The claims for penalties for failure to provide notice and removal of the company vehicle were dropped.

[106] I have dealt with the breach regarding the car. The failure to give notice was a breach of the employment agreement. The company was not entitled to attempt to substitute the period of an unjust suspension for proper notice.

Penalty for aiding and abetting

[107] The applicant also sought relief against Mr Gee personally pursuant to s.134 (2) of the Act in that Mr Ghee had incited, instigated, aided and abetted the respondent's breaches of the applicant's employment agreement, particularly in relation to the ongoing deliberate refusal to pay annual leave.

[108] The difficulty with this is that Mr Gee has not been named as a respondent in these proceedings and this claim was not in the Statement of Problem.

Penalty for breach of undertaking

[109] The applicant also sought a penalty for breaching the undertaking. I do not have jurisdiction to do that.

C**osts**

[110] If the parties are unable to resolve the matter of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority