

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 262
3026291
And 3027096

BETWEEN	KYLE SCIASCIA Applicant
AND	WHOLESALE CARS DIRECT (2017) LIMITED Respondent
AND BETWEEN	WHOLESALE CARS DIRECT (2017) LIMITED Applicant
AND	KYLE SCIASCIA Respondent

Member of Authority: Trish MacKinnon

Representatives: Viv d'Or, counsel for Mr Sciascia
Mike Gould, counsel for Whole Cars Direct (2017)
Limited

Investigation Meeting: 30 and 31 October 2019 at Wellington

Submissions Received: 31 October 2019 from both parties

Date of Determination: 29 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kyle Sciascia had been employed by Wholesale Cars Direct (2017) Limited (WCD) and/or by a related company, Wholesale Cars Direct 4 X 4 Limited, for ten years before his employment terminated in December 2017. Mr Sciascia claims he was unjustifiably disadvantaged by actions of WCD and unjustifiably dismissed.

[2] Mr Sciascia further alleges WCD breached its good faith obligations to him by accessing his private digital iCloud account and installing a number of monitoring applications on his work mobile device. He claims WCD further breached its good faith obligations by downloading data from his personal iCloud account including videos, photos and material of a sexual nature involving his wife, which it distributed to WCD employees.

[3] WCD denies all Mr Sciascia's claims. It says its General Manager suggested to Mr Sciascia that he leave work on Tuesday 19 December 2017 as he was not in a state to work productively. WCD says Mr Sciascia accepted that suggestion and thanked his employer for it.

[4] WCD denies having dismissed Mr Sciascia. It says Mr Sciascia tendered his resignation verbally in the course of a telephone conversation on the evening of 19 December 2017.

[5] WCD also denies accessing Mr Sciascia's iCloud account. It says that, following Mr Sciascia's resignation, it became aware of inappropriate material on his work computer. It also became aware he had sent confidential WCD information to email addresses outside the company. It says it discovered drug paraphernalia in Mr Sciascia's desk and arranged for his office to be tested for the presence of methamphetamine. WCD says an independent laboratory test confirmed a positive result for the presence of methamphetamine in his office.

[6] Separately from its response to Mr Sciascia's application, WCD commenced proceedings against him, with Wholesale Cars Direct (4 X 4) Limited as second applicant. That company has since been removed from the Companies Register and was subsequently removed as an applicant to those proceedings.

[7] WCD alleges Mr Sciascia has breached his individual employment agreement (IEA) and his duty of good faith. It seeks the imposition of a penalty on Mr Sciascia pursuant to ss 4A and 134 of the Employment Relations Act 2000 (the Act). The alleged breaches relate to Mr Sciascia sending confidential information belonging to WCD to addresses outside WCD's internal email system.

[8] Additionally, WCD claims that, following Mr Sciascia's resignation, a review of his work computer disclosed he had sent and received pornographic and other objectionable

material on it. It says that, and drug paraphernalia it discovered inside a locked set of drawers and locked safety box in Mr Sciascia's office, breached Mr Sciascia's IEA with it.

The Authority's investigation

[9] I have not set out a record of all the evidence received nor have I recorded all submissions made by the parties. I have set out the material facts and made findings on issues relevant to the determination of Mr Sciascia and WCD's claims against each other in accordance with s 174E of the Act.

[10] This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Issues

[11] The issues for determination are:

- (a) Whether Mr Sciascia was suspended and, if so, whether that unjustifiably disadvantaged him in his employment;
- (b) Whether he was unjustifiably dismissed;
- (c) Whether WCD breached its obligations of good faith to Mr Sciascia.
- (d) Whether Mr Sciascia was disadvantaged by being trespassed from WCD;
- (e) Whether Mr Sciascia breached his IEA and his duty of good faith to WCD by:
 - (i) Sending confidential WCD information to an external party;
 - (ii) By using his work computer for sending and receiving pornographic material;
 - (iii) By keeping drug paraphernalia in his office at WCD.
- (f) Whether penalties are warranted.

Employment Agreement

[12] During his employment with WCD, Mr Sciascia had a number of employment agreements, many of them being with a related company, Wholesale Cars Direct (4 X 4) Limited, which no longer exists. The relevant IEA that was in place when Mr Sciascia's

employment ended was entered into by the parties in April 2017 upon Mr Sciascia's acceptance of the role of Quality Control Manager. The terms of the IEA relevant to this determination are:

Mobile devices

The employer will provide the employee with a mobile device or devices. The employer will pay for data and calls (if applicable) up to a value of \$100 whether work related or not, as long as they consider the level of personal use to be reasonable.

Use must not be offensive, illegal or harm the employer's interests and must follow any relevant policies and procedures, e.g. security or international use, which the employer can review and update as required.

...

Confidentiality

The employee agrees to keep confidential information private. Except as part of the proper performance of their job, the employee will not directly or indirectly use, copy, share, or permit the use or copying of any confidential information owned by the employer unless they get written permission.

Confidential information means all information owned by the employer that is not in the public domain and which the employer reasonably regards as private. It includes, but is not limited, to:

- Commercial agreements
- Trade secrets
- Information about financial affairs
- Business methods and systems
- Detailed information and records about clients, potential clients, suppliers and employees
- Business strategies, including merchandising, budgeting, market analysis, pricing, advertising, products and services
- Computer software and data
- Other information not known to the public.

The requirement for confidentiality applies at all times while the employee works for this employer, and after the employment has ended.

Internet and social media use

The employee will have internet access as part of their job. Use must not be offensive, illegal or harm the employer's interests, and must follow the employer's policies.

Any business social media or email accounts, and associated followers or contacts, are the employer's property.

A reasonable level of personal internet use at work is acceptable if it does not affect the employee's ability to do their job.

...

Suspension

The employer might decide to suspend the employee on pay while investigating allegations against the employee, e.g. for serious misconduct, or if a condition, illness or injury means the employee poses an immediate risk to themselves and/or others.

...

Ending employment

The employer might end the employee's job with reasonable cause, or the employee might resign.

Unless otherwise set out in this agreement, either the employer or the employee can end employment by giving two weeks' notice in writing.

The employer may decide to pay the employee instead of the notice period.

...

After notice is given, the employer and employee will discuss the kind of duties the employee will be expected to carry out during the notice period. This may include a change in duties or being paid to not work (also known as "garden leave").

Nothing in this clause prevents the employer from ending the employee's employment without notice, or payment instead of notice, for serious misconduct or other reason provided for in this agreement.

Mr Sciascia's claims

Suspension and unjustifiable disadvantage

[13] Mr Sciascia claims he was sent home from work and thereby unjustifiably disadvantaged on 19 December 2017. He had returned to work on 18 December following a period of 13 days' annual leave. Mr Sciascia says the General Manager of WCD, Mr Gabriel Smith, briefed him on system changes that had been made to his (Mr Sciascia's) role in his absence and told him he was expected to "hit the ground running" with those changes.

[14] During the course of Mr Sciascia's first day back at work, Mr Smith advised him of two instances where he believed Mr Sciascia had not followed the new protocols and reminded him of the importance of getting things right quickly.

[15] On his second day back at work, Mr Sciascia said Mr Smith called him to his office and shouted at him over an incident where he perceived Mr Sciascia had not acted quickly enough in contacting a customer. Mr Sciascia said Mr Smith was angry and continued to shout at him, saying he and Mr Bottrill had been observing him on surveillance cameras while he had been working. Mr Sciascia said Mr Bottrill criticised his work performance, refused to allow him to respond, and eventually told him to "fuck off home" and to "sort his head out".

[16] Mr Steve Bottrill, who was the Assistant General Manager in December 2017 and the General Manager at the time of the Authority's investigation meeting, gave evidence of being in Mr Smith's office that morning. He denied Mr Smith was angry or that he had shouted at Mr Sciascia. Mr Bottrill said Mr Smith was merely checking that the customer had been contacted and that he also reminded Mr Sciascia of the importance of meeting customers' requirements quickly and communicating with them promptly to let them know that had been done.

[17] In Mr Bottrill's account of the meeting, Mr Smith had asked Mr Sciascia if he was "okay" as he seemed to be off task and not as focused as he normally was. He had asked whether Mr Sciascia was up to being at work that day or if he needed time to clear his head. Mr Sciascia had agreed he was not focused and appreciated the time to go home and unwind, and thanked Mr Smith for the opportunity to go home. Mr Sciascia rejected Mr Bottrill's account of the meeting.

[18] Mr Smith did not attend the Authority's investigation meeting or provide evidence to it so I do not have the benefit of his account of how the meeting of 19 December 2017 in his office proceeded. I do, however, have an email written by Mr Smith to Mr Bottrill on 22 December 2017 about the events that occurred two days earlier. WCD asked that the email be put in evidence as an almost contemporaneous account of Mr Smith's interactions with Mr Sciascia in his (Mr Sciascia's) last few days of employment with WCD. While I have some reservations about the email and do not accept it is necessarily always an accurate account of events, I will refer to it where I deem it appropriate and useful to do so.

[19] In the email Mr Smith referred to observing Mr Sciascia at work on the morning of 19 December. It seems he was not impressed with what he saw, and spoke of "erratic behaviour...along with a lot of talking and general mucking around." He said that by 11.00 a.m. he had "had enough" and called Mr Sciascia to his office for an explanation. Mr Smith's email then states that Mr Sciascia was "aware of his failings, but couldn't answer why he was so wayward. I decided to suspend him for the day & review in the morning. He accepted and knew his performance was poor."

[20] I prefer Mr Sciascia's version of the meeting over that of Mr Bottrill. I also note that Mr Smith's email, recording his decision to suspend Mr Sciascia, does not accord with WCD's statement in reply in which it is asserted Mr Smith "suggested" to Mr Sciascia that he

leave work on 19 December. I note also Mr Bottrill's evidence about Mr Smith's calm demeanour during the meeting of 19 December does not sit comfortably with Mr Smith's email account of having watched Mr Sciascia (on camera) during the morning and having had enough by 11 am. I accept Mr Sciascia's evidence of Mr Smith "reading the riot act" and ordering him to go home.

[21] For a suspension to be justifiable the general rule is that there must be an express provision in the employment agreement sanctioning suspension. Mr Sciascia's IEA contained provided that he could be suspended while allegations against him were investigated or where he was suffering from a condition, illness or injury that meant he posed an immediate risk to himself and/or others.

[22] Even if Mr Sciascia's performance of his duties was slower and perhaps more lacklustre than Mr Smith wished on the morning of 19 December 2017, it could not be classified as serious misconduct. Nor is there any suggestion that Mr Sciascia posed an immediate risk to himself or others. I find his suspension did not come within the situations sanctioned by his IEA. The suspension was unjustifiable and Mr Sciascia was disadvantaged by that suspension as will be clear from the events that followed it.

Dismissal

[23] After being ordered to leave the workplace at approximately 11.30 am that day, Mr Sciascia said he went home, and turned off his phone. When he turned it on again later in the afternoon he saw an email Mr Young had sent to him at 12.44 pm that afternoon, with the subject line "The future to think about".

[24] The email was critical of Mr Sciascia's performance that morning and included the following.

I personally think it's time to look at your job responsibilities, you are struggling to show me that you can do your job to the level required and your sales are going backwards. There for (sic) I am really struggling to justify your role in WCD.

...

Maybe you should ask yourself if this is what you should be doing once again because as far as leadership and professionalism goes it seriously looks like you shouldn't be in the car industry. ...

I think we should think about this over the next two weeks and meet up in early January to see where WCD and you sits in the future role relavent (sic).”

[25] It was Mr Sciascia’s evidence that Mr Smith contacted him by phone at approximately 5.45 pm to discuss Mr Young’s email. In the course of that conversation Mr Smith informed Mr Sciascia that Mr Young had changed his mind since sending the email and was no longer amenable to working things through with him in the New Year. Mr Smith advised Mr Sciascia to look for a new job, and said that Mr Young was “over it”.

[26] Mr Smith also advised Mr Sciascia that the parting of the ways would be amicable; Mr Young would look after him; and he would be in touch over what that meant financially once management had discussed and agreed it. Mr Sciascia said he asked Mr Smith if he could discuss this with his wife and get back to him.

[27] As previously noted, Mr Smith did not attend the Authority’s IM. In his email to Mr Bottrill dated 22 December 2017 he recounted his version of the telephone call which differed from Mr Sciascia’s account in that he did not mention Mr Young’s email or the thoughts Mr Young had expressed about the future of Mr Sciascia’s employment. Mr Smith’s email referred to the “raft of formal warnings” Mr Sciascia would face when he returned to work, relating to a number of performance issues. He also noted “serious repercussions” that could follow. Mr Smith noted in the email he had also queried whether the role was too much for Mr Sciascia and had given him the opportunity to think about what he had said and come back to him with a solution.

[28] Mr Sciascia said he called Mr Smith at approximately 8 pm that evening and told him he wished to continue his employment at WCD. He put a proposition to Mr Smith that entailed his relinquishing his management position and moving to a predominantly sales role with a commitment to sell a certain number of vehicles for each of the next three months. If he failed to reach that number of sales, Mr Sciascia said he would resign.

[29] Mr Smith, according to Mr Sciascia, told him he would contact Mr Young and discuss the proposal with him. Mr Smith called Mr Sciascia back within the hour to say Mr Young had rejected the proposal. Mr Smith turned down Mr Sciascia’s request to be able to work for the next two weeks, also advising him there was no work for him the next day and this was the end of an era with WCD.

[30] Mr Sciascia said at that moment he realised he had been dismissed although Mr Smith had not explicitly used the word dismissal. Mr Smith's email to Mr Bottrill of 22 December 2017 records that after a telephone discussion with Mr Sciascia on the evening of 19 December:

“We agreed that ending a career in WCD was best for him personally.”

[31] WCD's statement in reply records that Mr Sciascia indicated to Mr Smith in the course of the 19 December telephone discussion that he did not wish to continue his employment with WCD. I do not accept that version of events. Nor do I accept Mr Smith's email version that there was mutual agreement Mr Sciascia's employment would end. I find Mr Sciascia was effectively dismissed by Mr Smith on the evening of 19 December 2017.

[32] He had been told he could not return to work, that Mr Young was not willing to work things through with him in the New Year, was “over it”, and would not contemplate Mr Sciascia's offer to take a lesser role in the company. I accept Mr Sciascia's evidence that he realised he had been dismissed after that telephone call with Mr Smith and I agree that he had indeed been dismissed.

[33] There was no attempt at fair procedure by WCD and I find the dismissal was unjustifiable.

[34] To understand why Mr Sciascia verbally resigned later the next day it is necessary to look at the events that preceded that resignation and at Mr Sciascia's reasons for doing so. On the morning of 20 December 2017 Mr Smith and another WCD employee, James Thompson, went to Mr Sciascia's house. Mr Sciascia's recollection of that event is that he awoke to find them standing at the end of his bed, with Mr Smith shouting and swearing at him over photos and messages they had discovered on his work computer.

[35] Mr Thompson's evidence was that Mr Smith had asked that he accompany him to collect Mr Sciascia's work phone and computer as Mr Sciascia had resigned the previous day. Mr Thompson said Mr Smith knocked at Mr Sciascia's door, then entered the house. Mr Sciascia came to the door and he and Mr Smith started talking. In the ensuing discussion both men raised their voices. In oral evidence Mr Thompson said Mr Smith was angry, emotional and swearing. Mr Sciascia was unwilling to hand over his phone until he had deleted some personal material from it which he began to do. Mr Smith became impatient

over the time this was taking and, without opposition from Mr Sciascia, took the phone outside and smashed it on the concrete, leaving with Mr Thompson shortly thereafter.

[36] Later that morning Mr Sciascia said he went to the WCD worksite with an empty box to collect his personal belongings. His evidence is that Mr Smith told him to “fuck off” when he saw Mr Sciascia approach and frogmarched him from the premises.

[37] Mr Sciascia purchased a new mobile phone that day and attempted to have his number transferred to it. He said the number allocated to his work phone had been his personal mobile number for many years and it was important to him that he retain it. However, Vodafone informed him the only way the transfer of the phone number could be effected was if WCD actioned it.

[38] On his way home from purchasing the mobile phone Mr Sciascia said he encountered Mr Smith and Mr Thompson. Mr Smith showed Mr Sciascia photographs of a glass pipe he said had been found in a drawer in Mr Sciascia’s office at WCD. He then handed Mr Sciascia a trespass notice, effective for two years, from WCD’s premises. Mr Smith advised him the Police had been informed and would be calling on Mr Sciascia to question him about the pipe and return his personal effects.

[39] Mr Sciascia’s evidence is that he realised at this point he had no job at a time that was so close to Christmas it was unlikely he would be able to find one, and he had no control over his email accounts until WCD authorised the transfer of the phone number to him. For that reason he called Mr Smith later that day to concede defeat and tender his resignation from WCD, conditional on WCD actioning the transfer of the phone number to him.

[40] Mr Sciascia said he intended to provide his resignation in writing that evening giving three months’ notice as his IEA required a resignation to be in writing. Before he could do that, however, he received an email from Mr Smith accepting the verbal resignation he had offered by phone earlier that day.

[41] I accept Mr Sciascia’s evidence regarding the events that led to his tendering of a resignation on 20 December 2017. His is the only direct evidence of what occurred after Mr Smith suspended Mr Sciascia, apart from Mr Thompson’s evidence about his and Mr Smith’s visit to Mr Sciascia’s house on 20 December 2017. Mr Thompson’s oral evidence supported much of Mr Sciascia’s account of that event.

[42] Mr Sciascia's verbal resignation on 20 December 2017 does not alter the fact that he had been dismissed the previous evening. I find his resignation was no more than an attempt to ameliorate the effects of his dismissal by gaining WCD's cooperation with regard to regaining his mobile phone number.

Breach of good faith?

[43] The first part of Mr Sciascia's claim of a breach of good faith against WCD is that it accessed his private digital iCloud account between 12 and 14 November 2017 when it had control of his mobile phone while its screen was being replaced. In support of his claims Mr Sciascia engaged Michael Chappell, Managing Director of NZ Forensics. Mr Chappell is a Forensic Consultant/Analyst. He provided evidence to the Authority of the process he had followed in analysing Apple data records detailing activity and usage on Mr Sciascia's Apple iCloud application.

[44] Mr Chappell gave evidence that when an Apple iPhone is set up an Apple iCloud account and an Apple iTunes account is part of the set-up process. Those accounts can then be accessed from any computer or mobile device and were also accessible on Mr Sciascia's work and home computer. To be accessible, they must be verified as trusted devices. That verification would have to have carried out from another trusted device. Mr Sciascia confirmed under questioning his work computer was enabled as a trusted device. He said his iCloud password was necessary to access the account.

[45] Mr Chappell's evidence was that between 12 and 14 November 2017 a number of applications were installed on Mr Sciascia's work mobile phone, including a keylogger, monitoring applications, a password recorder, a remote mobile controller, a mobile monitor, and other tracing applications.

[46] WCD denies installing those applications on Mr Sciascia's phone and says Mr Sciascia himself installed the applications that Mr Chappell had detected. It asserts Mr Sciascia had done so for personal reasons relating to another family member potentially accessing his phone. It also says it did not download any information from Mr Sciascia's iCloud account and did not have his password to do so. All the information it retrieved was from Mr Sciascia's work computer. WCD says that Mr Sciascia had performed an unencrypted back up from his phone to the computer in November 2017.

[47] Mr Bottrill's evidence was that Mr Sciascia was still using his phone between the dates he said his employer had the phone. Mr Bottrill said the phone had not been sent away until 19 November and it had not been repaired: it had been wiped clean and returned to WCD. Furthermore, Mr Sciascia had been given a new iPhone when his was sent away, and he (Mr Sciascia) had set up the iCloud account, managed the settings and transferred data from his personal Samsung phone to the new iPhone. Mr Sciascia denied having undertaken the transfer.

[48] I found the evidence on this matter inconclusive. Mr Sciascia acknowledged in relation to another matter, relating to a warning he had received over drug usage, that he could have been mistaken over the date that warning was given. In the allegations he has made about his employer's actions relating to his iPhone, I would need to be confident Mr Sciascia was correct in saying WCD had possession of his phone on the dates he specified.

[49] I accept Mr Chappell's evidence regarding the installation of applications on Mr Sciascia's iPhone between 14 and 17 November 2017, but I am not sufficiently confident the phone was in WCD's possession at that time. Mr Chappell acknowledged under cross examination that he did not know when the phone had been sent for repair: he had accepted the information Mr Sciascia had provided him on that matter.

[50] I also find the evidence around WCM accessing Mr Sciascia's iCloud account problematic and inconclusive. That being the case, I am unable to find a breach of good faith by WCD in relation to that matter.

[51] The second part of Mr Sciascia's breach of good faith claim is that WCD distributed to other employees material of a sexual nature involving his wife. Mr Sciascia cited a WCD employee who had informed him this had occurred. That employee did not provide evidence to the Authority.

[52] Mr Bottrill denied there had been any distribution of that material to WCD employees. In the absence of any direct evidence to the contrary I accept that evidence and find there was no breach of good faith by WCD.

Was Mr Sciascia disadvantaged by the trespass notice?

I have found Mr Sciascia was dismissed on the evening of 19 December 2017. He was trespassed the day after he was dismissed and accordingly could not have suffered disadvantage in his employment from the trespass order. I dismiss this claim.

WCD's claims

Did Mr Sciascia breach his IEA and/or duty of good faith?

[53] There are three claims against Mr Sciascia which I shall consider separately. The first relates to emails.

[54] WCD provided copies of 17 emails it said Mr Sciascia had sent outside its internal mail system between 19 November 2015 and 28 November 2017. The majority of those emails related to the time when Mr Sciascia was employed by Wholesale Cars Direct (4x4) Limited which, as earlier noted, was removed as an applicant in the proceedings against Mr Sciascia after its removal from the Companies Register. I shall disregard those 13 emails and consider only the four that related to Mr Sciascia's employment with WCD following his signing of an IEA on 10 April 2017.

[55] WCD asserts that in sending those emails Mr Sciascia breached the confidentiality provisions of his IEA, under which he agreed to keep his employer's confidential information private. It also submits Mr Sciascia breached his duty of good faith. WCD says it only became aware of the breaches after Mr Sciascia's employment terminated in December 2017.

[56] The confidentiality clause is set out earlier in this determination. The duty of good faith is a statutory one set out in s 4 of the Act. For the purposes of this particular employment relationship and situation I summarise the obligations as being a requirement that the parties deal with each other in good faith; not do anything to mislead or deceive each other, or that is likely to mislead or deceive the other; and to be active and constructive in establishing and maintaining a productive employment relationship, including being responsive and communicative. Section 4(4)(bb) specifies that the duty applies to any matter arising under or in relation to an IEA while the IEA is in force.

[57] Mr Sciascia acknowledged he had forwarded the four emails to his wife during his employment. It is clear that in doing so, he breached the confidentiality provisions of his IEA. I find he also breached his duty of good faith to WCD under s 4(4)(bb) of the Act.

[58] The second allegation WCD made against Mr Sciascia was that he had used his work computer for sending and receiving pornography and other material that was objectionable. Mr Bottrill gave evidence of being tasked by Mr Smith on the evening of 19 December 2017 with shutting down Mr Sciascia's external computer access and email access, which he did.

[59] Mr Bottrill said he then logged into Mr Sciascia's desktop work computer and began "cleaning and deleting" the content. He said he noticed a file with the same name as the suburb in which Mr Sciascia lived and on opening it saw that it contained a number of photographs of Mr Sciascia's family and house. Mr Bottrill's evidence was that among the photos were many pornographic images. He reported this to Mr Smith who asked him to search Mr Sciascia's computer and emails to see whether this was a one-off breach of company policy.

[60] Mr Bottrill's evidence is that, as he searched, he came across more and more images and saved websites which he said shocked and affected him greatly. The images included sexual activity and material relating to religious extremism. WCD provided the Authority with a report from Computer Forensics NZ Limited (Computer Forensics) prepared by Thomas Orton, a Computer Forensic Examiner. Attached to his report was a list of websites accessed by a computer asserted by WCD to be that used by Mr Sciascia during his employment with it. Mr Orton did not provide evidence directly to the Authority.

[61] Mr Sciascia denied accessing any of the listed websites and questioned whether the computer that had been analysed by Computer Forensics was his. He also claimed other people could have used his work computer and noted a number of the dates of alleged access during 2017 were Saturdays and Sundays, which were days he did not work.

[62] Mr Sciascia acknowledged he could identify some items on the list of websites and also that he had been able to access his work computer remotely. He said the sites he recognised related to online banking and a pizza delivery service. I am not persuaded by the evidence that Mr Sciascia was the only person who had access to his work desktop computer and therefore I am unwilling to find he breached the internet and social use provision of his IEA or his duty of good faith.

[63] With regard to intimate photographs, Mr Sciascia did not deny that there were images relating to family members in a folder bearing the name of the suburb in which he resided. He blamed Mr Bottrill for this and said that, when he was given a work iPhone by his employer, he gave Mr Bottrill his personal Samsung device to transfer data to the new iPhone. This was because he was not familiar with iPhones, unlike Mr Bottrill.

[64] Mr Sciascia said the SD card from his Samsung device contained many personal photographs which were then transferred to the iPhone when Mr Bottrill undertook the migration of data to the new device. It was Mr Sciascia's evidence that those photographs were in a private folder in his iCloud account. Mr Bottrill denied having transferred data from Mr Sciascia's personal Samsung device to the new iPhone. He said he had been responsible for doing that for other employees but Mr Sciascia was technologically savvy and had required no assistance with it.

[65] Mr Bottrill also denied accessing Mr Sciascia's iCloud account, and said he had no means of doing so as he did not have Mr Sciascia's password. Mr Bottrill said pornographic and other objectionable material was stored on Mr Sciascia's computer in violation of the employer's internet access policy.

[66] I accept WCD's evidence that there was material of an intimate and objectionable nature on Mr Sciascia's desktop computer that Mr Bottrill accessed after the termination of Mr Sciascia's employment. I also accept that material could reasonably be considered "offensive" and thereby in breach of the internet and social media use provision of Mr Sciascia's IEA.

[67] I have already determined, however, when considering Mr Sciascia's claim that WCD breached good faith in accessing his private iCloud account, that the evidence around that matter was inconclusive. As I understand it, the "offensive" images were on the SD card of Mr Sciascia's personal Samsung device. They migrated to his new iPhone during the data transfer and that made them accessible from his desktop computer.

[68] I would need to be persuaded Mr Sciascia undertook the transfer in order to find him culpable of breaching the internet provision of his IEA. If he did not undertake the transfer he could not be held accountable for the images being available from his work computer. I am not persuaded by the evidence before me that Mr Sciascia did undertake that transfer of data and therefore decline to find he breached his IEA or his duty of good faith.

[69] The third alleged breach of Mr Sciascia's IEA alleged by WCD was that he had drug paraphernalia in a locked drawer in his office inside a locked safety box to which only Mr Sciascia had the keys. Mr Bottrill's evidence was that he had been tasked with cleaning out Mr Sciascia's office after Mr Smith had trespassed him.

[70] Mr Bottrill said he had located what appeared to be a large dictionary in a drawer of a credenza in Mr Sciascia's office. On examination he realised the dictionary was a locked metal box. After some further rummaging Mr Bottrill found a key for the box in the drawers and inspected its contents, amongst which was a cigarette packet containing a glass pipe. Mr Bottrill said he contacted the police at this point. It was his evidence that when the police came, they confirmed the pipe was a utensil for smoking methamphetamine.

[71] Mr Sciascia denied the pipe was his and described it as a very crude attempt to plant evidence against him. He confirmed the dictionary/metal box belonged to him and did not deny he had previously received a warning from his employer after failing a methamphetamine test, although he initially disputed the date that had occurred. He said his employer subsequently withdrew the warning. This was not disputed by WCD.

[72] I have previously referred to Mr Sciascia having returned from 13 days' holiday on 18 December 2017. He had been suspended from his employment the following morning. There was opportunity during the time he was on holiday, and while he was suspended, for other employees to access Mr Sciascia's office. While the pipe discovered by Mr Bottrill may have belonged to Mr Sciascia, I am unwilling, in such circumstances, to find that it did or that it was more likely to belong to him than not. Accordingly I dismiss WCD's claim.

Penalty?

[73] Every party to an employment agreement who breaches the agreement is liable to a penalty under the Act.¹ A party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty in certain situations.² The situations relevant to Mr Sciascia's breaches are if failure to comply with the duty of good faith is deliberate, serious, and sustained or when the failure was intended to undermine his IEA or his employment

¹ S 134 of the Act.

² S4A.

relationship. The maximum penalty for a breach that can be imposed on an individual is \$10,000.³

[74] WCD submits Mr Sciascia's breaches, both of his IEA and his duty of good faith warrant the imposition on him of one penalty of \$10,000.

[75] I have considered WCD's submissions and reject them for the reasons I set out below.

[76] Of the three separate areas of breach alleged by WCD, I have upheld only one, that relating to sending confidential information externally from its email system. Of the 17 emails WCD alleged had been sent, four were found. The most recent of the four emails Mr Sciascia sent to his wife was 28 November 2017. It included an email trail between Mr Young and Mr Sciascia, and an email from Mr Smith to Mr Bottrill and another management employee, in which Mr Smith favourably referred to Mr Sciascia for the work he was doing. The reason given by Mr Young for forwarding Mr Smith's email was that he thought Mr Sciascia should know.

[77] It appears that Mr Sciascia wanted his wife to see the praise he had received for his work from both Mr Smith and Mr Young. While the email trail contained information that concerned other employees, I accept that was not the reason Mr Sciascia sent the email to his wife.

[78] The next most recent email was sent by Mr Young to Mr Sciascia on 26 October 2017. Mr Young had copied in three senior managers. The subject line was "Confidential" and the content concerned disciplinary action Mr Young had taken against an employee who was named in the email. Mr Sciascia forwarded the email to his wife without any explanatory comment.

[79] When I asked why he had sent her the email, Mr Sciascia said it was to give his wife an understanding of the pressures he was under at work. He agreed he should not have sent the email. As part explanation, Mr Sciascia said that Mr Young did not operate WCD's business with privacy in mind as was shown by the number of emails he would send to most of his staff that included information about other employees.

³ S 135(2)(a).

[80] The final two emails Mr Sciascia forwarded had been sent to him and a number of other WCD employees and had attachments comprising charts that showed sales of vehicles for, respectively, the months of May and June 2017. The sales were set out in columns under the names of individuals of whom Mr Sciascia was one. He made the following comments in forwarding those emails: “SH!# Yeah!!!!!!” for the May chart and “Yus!!” for the June chart. Those comments suggest the reason for forwarding the emails was to brag about his success.

[81] Under cross examination Mr Sciascia said he had not been aware of the confidentiality provision in his employment agreement. However, when shown a copy of the IEA he had signed on 10 April 2017, Mr Sciascia agreed he had initialled the pages containing those provisions.

[82] While any breach of an employment agreement can be viewed as serious, I am inclined to regard Mr Sciascia’s breaches as being very much at the lower end of the scale of gravity. They appear to me to have been motivated mainly by the very human emotion of pride and a wish to share with a loved one his pleasure at being praised, or being seen as successful, by his employer. In one instance his motivation was to share the pressures of his job with her.

[83] No evidence was given that WCD suffered in any way from Mr Sciascia’s breaches of confidentiality.

[84] In these circumstances I do not find it appropriate to impose a penalty on Mr Sciascia for the breaches of his employment agreement. However, I would encourage him to take seriously the confidentiality provisions of any current or future employment agreements he enters into.

[85] Nor do I consider Mr Sciascia’s breaches of the duty of good faith he owed WCD to have been deliberate, serious and sustained. I regard them rather as having been committed in ignorance of an obligation of which he should have been aware. His breaches were made thoughtlessly and, in the main, out of pride. I do not find a penalty to be warranted for Mr Sciascia’s breaches of good faith but again would encourage him to take that duty seriously in any current or future employment relationships.

Remedies and Contribution

[86] I have found Mr Sciascia was disadvantaged when his employer unjustifiably suspended him on 19 December 2017. I have also found he was unjustifiably dismissed that evening. He is entitled to remedies of lost wages and compensation for the hurt and humiliation he suffered.

[87] Mr Sciascia gave evidence of the stress, anxiety and trauma of being treated so unfairly by an employer for whom he had worked for a number of years. He said he was still coming to terms with it. His father, Mr Alan Sciascia, gave evidence of the changes in his son's personality that he attributed to the manner in which his employment had been terminated from WCD, including not attending family occasions he always had in the past and becoming insular.

[88] Mr Sciascia said it took him five months to find alternative full time employment although he had picked up some contract and part-time labouring work before that.

[89] Subject to contribution, I find Mr Sciascia is entitled to a sum equal to three months' wages, less any remuneration earned within that period, in accordance with s 128 of the Act. From wage records provided to Mr Sciascia by WCD I have calculated three months' wages to be \$22,600 gross (\$17,854 nett). Bank records submitted by Mr Sciascia reveal his nett earnings within the 13 weeks from his dismissal to have been \$1,047.63.

[90] Mr Sciascia has sought \$10,000 to \$15,000 in compensation for the humiliation, loss of dignity and injury to feelings he suffered as a result of his dismissal. No additional compensation was sought in relation to his claim to have been disadvantaged by his unjustifiable suspension. I find, in assessing the evidence that, subject to any contribution, Mr Sciascia is entitled to \$15,000 compensation under s123(1)(c)(1) of the Act.

[91] I am obliged to consider whether, and to what extent, Mr Sciascia's actions contributed to the situation that gave rise to his personal grievances and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.⁴

[92] I find Mr Sciascia did not contribute to the situation that led to his unjustifiable suspension or dismissal. He may not have applied himself to his duties on his return from

⁴ In accordance with s 124 of the Act.

holiday with the speed and alacrity Mr Smith would have liked. However, that behaviour did not merit the unjustified suspension that was imposed on him.

[93] Nor could Mr Sciascia have contributed to his ensuing dismissal. He showed himself to be willing to engage with his employer over ways in which he could tailor his performance to the new expectations WCD appeared to have of him on his return from holiday. However, his employer cut short any possibility of engagement by dismissing him.

[94] I find no evidence of contribution by Mr Sciascia to his unjustifiable suspension or to his unjustifiable dismissal.

Summary of findings

[95] Mr Sciascia was unjustifiably suspended and unjustifiably dismissed. He was not disadvantaged by being trespassed from WCD premises as that occurred after he had been dismissed.

[96] Mr Sciascia's claims that WCD breached its obligation of good faith to him fail.

[97] WCD's claim that Mr Sciascia breached his IEA and his statutory duty of good faith succeed only in regard to his sending emails containing confidential information outside the company. The circumstances in which he did so do not warrant the imposition of a penalty.

Orders

[98] Wholesale Cars Direct (2017) Limited is ordered to pay Mr Sciascia the following:

- (a) \$16,806.37 nett⁵, being wages lost as a result of his unjustifiable dismissal; and
- (b) \$15,000 in compensation for the humiliation, loss of dignity and injury to feelings he suffered.

[99] Leave is granted to the parties to contact the Authority within two weeks of the date of this determination if either party disagrees with my calculation of lost wages.

⁵ Being three months' (13 weeks) wages less remuneration earned.

Costs

[100] Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority