

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 404
3146942

BETWEEN	CUSTOM MOTOR BODIES (1998) LIMITED Applicant
AND	NICHOLAS JAMES JONES Respondent

Member of Authority:	Marija Urlich
Representatives:	Kathryn Gilling, Applicant director Mr Jones in person
Investigation Meeting:	17 August 2022
Submissions and further information received:	At the investigation meeting
Determination:	22 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Custom Motor Bodies (1998) Limited (CMBL) employed Nicholas Jones from 2014 until his resignation effective 13 July 2021. CMBL says actions of Mr Jones including taking and selling scrap aluminium from its premises without permission breached terms of the employment agreement causing it loss and was a failure to act in accordance with the statutory duty of good faith. It seeks an award of \$1,393 being money received by Mr Jones for the scrap aluminium and an award of damages for losses arising from that and other claimed breaches of contract.

[2] Mr Jones says variously his actions were authorised, did not involve property belonging to CMBL or were reasonable. He has not brought a claim against CMBL.

The Authority's investigation

[3] During the investigation meeting the Authority received evidence from Kathryn Gilling and Peter Gilling, who are directors of CMBL and Mr Jones. An affidavit was received from a current employee who worked with Mr Jones. Mr Jones filed signed statements from an associate with whom he traded scrap metal, a former co-worker at CMBL and his current employer.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received.

Issues

[5] The issues identified for investigation and determination are:

- a) Has Mr Jones breached terms of his employment agreement and breached the statutory duty of good faith?
- b) If so, have those breaches caused loss to CMBL including:
 - i. \$1,393 being the sale price of scrap metal Mr Jones received. CMBL says it owned the scrap metal and is entitled to this sum; and
 - ii. an amount in punitive damages for allegedly malicious and deliberate breaches of clause 6.2 of the employment agreement and compensatory damages to CMBL and its owners?
- c) Is either party entitled to an award of costs?

Parties' employment agreement and relevant law

[6] The relevant individual employment agreement (employment agreement) includes:

Principal duties

...

6.2 You also have general duties to:

- (a) comply with reasonable directions given to you by the employer;
- (b) at all times act faithfully, honestly and diligently;
- (c) deal with the employer in good faith in all aspects of the employment relationship;
- (d) ensure you are performing solely work related activities in work time;
- (e) exhibit a professional and courteous attitude when dealing with the Employer, its customers, employees, suppliers and other members of the public; and
- (f) act in the Employer's best interest at all times.

[7] Under the employment agreement Mr Jones was entitled to full personal use of a company motor vehicle (clause 16).

[8] Also, under the employment agreement Mr Jones was provided with a mobile phone the use of which was restricted to business purposes with "reasonable personal use [is] only permitted where specifically authorised by the Employer." (clause 17.1).

[9] Clause 19 of the employment agreement dealt with confidential information and provides:

You agree at all times during and after your employment with the Employer:

- (a) to refrain from directly or indirectly disclosing to a third party Confidential Information except in the proper course of carrying out your duties;
- (b) not to use the confidential information for any purpose other than for the benefit of the Employer;
- (c) to keep confidential all Company Confidential Information; and
- (d) to comply with the terms of this Agreement unless otherwise required by applicable laws or regulations.

[10] The employment agreement contained a definition of confidential information which includes business contacts.

[11] Section 4 of the Employment Relations Act 2000 requires that parties to employment relationships must deal with each other in good faith which includes that they must not mislead or deceive each other, must be active and constructive in the employment relationship and be responsive and communicative.¹

¹ Section 4 Employment Relations Act 2000.

Discussion

[12] CBML manufacturers custom truck bodies. During the relevant period Mr Jones was the workshop supervisor. This was a position of trust and responsibility particularly given Mr and Mrs Gilling were often off site in the afternoon attending to other matters.

[13] In the week beginning 5 July 2021 Mrs Gilling reviewed the monthly mobile account which showed significant data usage over some recent weekends by Mr Jones' mobile. This was raised with Mr Jones who returned the mobile to CMBL for the purpose of understanding the data usage. On examination, text messages contained on the phone indicated use that appeared to be unauthorised and actions Mr Jones had taken which were unauthorised. On 12 July 2021 CMBL wrote to Mr Jones raising matters to be investigated including whether there had been unauthorised use of the mobile phone and the matters disclosed in those text messages. On 13 July Mr Jones' employment with CMBL ended by way of resignation.

[14] Mr Jones did not dispute he used his work mobile to send text messages which included he had:

- "...clean[ed] up the ally [aluminium] rack and t[aken] all the hidden off cuts lol";
- arranged for unlawful substances to be delivered to him at the CMBL workshop for distribution;
- arranged terms of cash jobs for him to perform at the CMBL workshop;
- distributed images of personal work done in the CMBL workshop using CMBL materials;
- distributed confidential or private information to third parties, including CMBL suppliers, of an employee drug test result, a job offer made by CMBL and pages of Mr Gilling's diary; and
- made disparaging remarks about Mr Gilling to a CMBL supplier.

[15] By way of explanation Mr Jones said:

- the aluminium did not belong to CMBL;
- he did not take any money for the unlawful substances;
- any personal work was done outside work hours in his own time;

- as the supervisor he was responsible for assessing what material was off-cut or scrap and any material he used in his personal projects was in that category; and
- freedom of speech.

[16] There is no dispute the use of the mobile telephone as described in [14] above was unknown to CMBL until its discovery in July 2021. The use of the mobile as described and Mr Jones' accepted conduct in the CMBL workshop disclosed by those text messages was unreasonable and I am satisfied on the evidence unknown to and unauthorised by CMBL. It breached the agreement between the parties as to how Mr Jones would use the work provided mobile phone. In addition, arranging for delivery of unlawful substances to the workplace was inconsistent with the obligations Mr Jones owed CMBL under the employment agreement and s 4 of the Act as was accessing confidential information and distributing it without CMBL's knowledge and agreement, which I find was the case. Any use of CMBL resources albeit time, off cuts or workshop space or tools without the knowledge and agreement of CMBL was unauthorised and in breach of the contractual obligation set out at clause 6.2(b), (c) and (f) of the employment agreement as well as the statutory duty. With respect to the matter of free speech, the common sense response is that using the employer supplied mobile telephone to text message derogatory views of the employer with a long-standing supplier in the course of work-related duties is not consistent with the duty of good faith and breached the express obligations Mr Jones agreed to in the employment agreement in particular clause 6.2(b), (c), (d) and (f).

[17] With regard to the claim for an award equivalent to the scrap metal sales, CMBL presented in evidence documents from the scrap metal merchant it regularly uses recording cash purchases of scrap metal from Mr Jones between 3 September 2019 and 30 June 2021.² CMBL says the scrap metal is off cuts of its manufacturing process (aluminium extrusion clip) and Mr Jones did not have permission to sell those off cuts to the scrap metal dealer and retain the proceeds of that sale.

[18] Mr Jones accepted he sold the aluminium to the dealer but says it belonged to his associate. In evidence he said he stored the aluminium on CMBL premises and used

² The document shows fourteen cash purchases in this period from Mr Jones of aluminium extrusion totalling \$2,268.95.

his work vehicle to transport it to the scrap metal merchant. He accepted CMBL did not know about the sale of the aluminium or the use of its premises and vehicle for its storage and transportation.

[19] I am satisfied the aluminium sold by Mr Jones is more likely than not to have been the property of CMBL because the unauthorised selling of CMBL's "ally" is in a text message he sent, the aluminium is the type of material used in the CMBL workshop, its storage and transportation involved CMBL resources, and the evidence of its origin elsewhere is not strong.

[20] Further, I am satisfied Mr Jones sold the aluminium while he was employed by CMBL and he did not seek CMBL's permission to do so or permission to use its vehicle for its transportation in breach of express obligations owed under the employment agreement at clause 6.2(b), (c) and (f). Mr Jones' actions have deprived CMBL of the proceeds of the sale of the aluminium causing it direct loss of \$2,268.95.

Can CMBL recover losses arising from the established breaches?

[21] I am satisfied, for the reasons set out above that Mr Jones has breached the employment agreement and that CMBL is entitled to recover from Mr Jones damages arising from those breaches.³

[22] The loss CMBL suffered arising from the sale of the aluminium is quantifiable at \$1,393 being the sale proceeds of the aluminium of \$2,268.95 less \$875.95 which CMBL deducted from Mr Jones' termination pay.⁴ Mr Jones is ordered to pay CMBL \$1,393 within 21 days of the date of this determination.

[23] I am satisfied on the evidence presented that CMBL has suffered further loss arising from Mr Jones' breaches of obligations owed under the employment agreement. CMBL has had to spend time and resources repairing long standing business relationships which the evidence established were damaged as a consequence of Mr Jones' breaches, has investigated the breaches and engaged with enforcement agencies,

³ Section 161(1)(b) Employment Relations Act 2000.

⁴ For completeness the evidence indicated Mr Jones did not give written consent to this deduction as required by the Wages Protection Act 1983. The matter of the deduction was not before the Authority for determination.

so expending further time and resources. I am satisfied on the evidence the damage is quantifiable at \$4,000 and Mr Jones is ordered to pay CMBL that sum within 21 days of the date of determination. In addition, CMBL has been put to the effort of bringing an application before the Authority the \$71.56 filing fee for which it is entitled to recover from Mr Jones.

[24] Finally there are some technical issues to address. At the investigation meeting CMBL characterised the claim for damages as a 'penalty'. There is no penalty application before the Authority because CMBL did not expressly claim a penalty under s 134 of the Act or, any other penalty provision available under the Act. Due to the quasi-criminal nature of penalties, they must be expressly claimed and done so within the 12 month statutory time frame. There was also a claim for 'punitive' damages. The Authority does not have jurisdiction to award punitive damages.⁵

Outcome

[25] Nicholas Jones has breached obligations owed under his employment agreement to his former employer Custom Motor Bodies (1998) Limited. Within 21 days of the date of determination he is to pay Custom Motor Bodies (1998) Limited the following sums:

- (i) \$1,393 being the loss of profit from the sale of aluminium;
- (ii) \$4,000 in damages for the other established breaches of the employment agreement; and
- (iii) \$71.56 in reimbursement of the filing fee.

Marija Urlich
Member of the Employment Relations Authority

⁵ *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 at [183].