

Attention is drawn to orders  
prohibiting publication  
of certain information  
in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 354  
3119953  
3148081

BETWEEN

DARRYL DE BILLOT  
Applicant in 3119953  
Respondent in 3148081

AND

PLASTIC MACHINERY  
WORKS LIMITED  
Respondent in 3119953  
Applicant in 3148081

Member of Authority: Nicola Craig

Representatives: Mark Donovan, counsel for Darryl de Billot  
Jo Douglas, counsel for Plastic Machinery Works Limited

Investigation Meeting: 14 and 21 June 2022

Submissions received: 5, 19 and 26 July 2022 from Mr de Billot  
6, 19 and 26 July 2022 from Plastic Machinery Works Limited

Date of determination: 11 July 2023

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Plastic Machinery Works Limited (PMW or the company) is the only distributor in New Zealand under sole agency agreements for plastics machinery from certain international suppliers.

[2] From 2013 Darryl de Billot worked as a trained service technician for PMW. He and Jeffrey Powers, PMW's managing director, are in dispute about the nature of

their agreement in terms of whether Mr de Billot was promised a shareholding in PMW. High Court proceedings were filed regarding this.

[3] Mr de Billot was made redundant by PMW in August 2020.

[4] Mr de Billot lodged a claim in the Authority regarding wages and alternative holidays.<sup>1</sup> PMW largely denies further money is owing.

[5] PMW later lodged its own claim in the Authority that Mr de Billot breached confidentiality obligations still owed to it and failed to return company property.<sup>2</sup> Mr de Billot denies both allegations, saying that he is operating his own business but not using PMW's information and has returned all the PMW property still in his possession when his employment ended.

### **The Authority's investigation**

[6] As PMW sought interim orders, those were heard early. Consideration was given to whether some or all of Mr de Billot's claims could be heard with those matters on affidavit evidence but ultimately it was decided they should not. A determination was issued making interim orders requiring Mr de Billot not to use, disclose or distribute any of PMW's confidential information in an electronic folder entitled "Technical Info" for particular purposes.<sup>3</sup> Non-publication orders were also made.

[7] To deal with substantive issues between the parties, an investigation meeting was held on 14 and 21 June 2022 to look at both matters. Witnesses relied on previous affidavits and additional witness statements were also received. Oral evidence was heard from Mr de Billot, PMW's Mr Powers, its former technician Thomas Rostig and a current technician, along with computer experts Cameron Hansen-Beadle and Michael Chappell. The two technicians gave evidence from Australia via audio-visual link. It was agreed that there was no need to hear oral evidence from a collections agent who had provided an affidavit at the interim stage. His affidavit is considered.

[8] The parties provided separate submissions on each matter in writing after the investigation meeting.

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<sup>1</sup> File no 3119953.

<sup>2</sup> File no 3148081.

<sup>3</sup> *Plastic Machinery Works Limited v Darryl de Billot* [2021] NZERA 588.

[9] This determination has been issued more than three months after the date on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

[10] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **Non-publication orders continue**

[11] PMW sought non-publication orders regarding the names of its clients and suppliers including any contact people and any identifying details. This order was not opposed by Mr de Billot.

[12] Interim orders were made. PMW's clients and suppliers have not been directly involved in these proceedings and at least some may not be aware of them. I order that until further order of the Authority, the names and identifying details of PMW's customers and suppliers along with contact people in those businesses not be published.

### **Issues outlined**

[13] The issues for investigation for Mr de Billot are:

- (a) Does PMW owe Mr de Billot in relation to any work done on public holidays?
- (b) Does PMW owe Mr de Billot unpaid wages?
- (c) Did PMW pay Mr de Billot his final pay late and if so, should it have to pay damages for breaching his employment agreement?

[14] Mr de Billot's statement of problem initially sought one month's wages in lieu of notice along with annual holiday pay. These two matters are now resolved. The listed issues above were raised by way of amended statement of problem before the investigation meeting. A claim for penalties was withdrawn at the start of the investigation meeting. For the sake of completeness I note that no personal grievance claim was brought.

[15] The issues for investigation for PMW are:

- (a) Did Mr de Billot breach his employment agreement by keeping, using or deleting PMW's confidential information?
- (b) If so, should a compliance order be made or permanent injunction ordered?
- (c) Did Mr de Billot breach his employment agreement by failing to return all company property on termination?
- (d) If so, should an order be made requiring its return?

[16] PMW wished to defer consideration of damages and penalties regarding confidential information. There was no objection on Mr de Billot's part and the investigation meeting proceeded on that basis.

### **PMW's business**

[17] As well as supplying machinery to form plastic, PMW provides parts and services customers' plastics machinery in support of its sole agency agreements with machinery suppliers. Mr Powers bought the business in 2013 from a family member. It was a new industry for him with his background being sales roles and the like in the legal and IT sectors.

[18] Mr Powers had flatted with Mr de Billot in London. He approached Mr de Billot about working for PMW on the technical servicing side. Mr de Billot had a number of practical qualifications, starting out as a mechanic and expanding into electrical work.

[19] There were discussions at the start and over the years between Mr Powers and Mr de Billot about the latter becoming a shareholder in the business. Mr de Billot describes them as operating as two friends going into business together, so when the business was more established he would occasionally indicate he needed money out of the company and Mr Powers would give him some. Mr Powers agreed there were discussions but not that the two went into business together. No formal agreement was entered into.

[20] After an initial period, Mr de Billot was based principally from a home office, resulting in him storing company equipment and materials there. He refers to using both PMW and his personal computers for work although Mr Powers says he was not aware of this.

[21] After Mr de Billot's departure PMW in New Zealand did not employ any employees for some time although Mr Powers still undertook a sales and support role. Technical servicing was provided from Australia where a related company employs three technicians.

### **Employment agreement**

[22] The 2013 written employment agreement between PMW and Mr de Billot contains the following confidential information requirements at clause 10.1:

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties... any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this Agreement. This includes, but is not limited to, information about the Employer's business.

[23] The agreement also imposes an obligation to return all PMW information and property on termination of employment.<sup>4</sup>

[24] What the employment agreement does not include is either a broad restraint of trade clause preventing work in the same field or a specific non-solicitation provision stopping Mr de Billot from doing business with PMW's clients.

[25] The agreement does not well capture the practicalities of payment arrangements between PMW and Mr de Billot. It provided for:

- (a) an annual salary of \$48,000 but without specifying whether this was gross or net. Mr de Billot's salary was actually set on a net basis; and
- (b) an annual bonus at the employer's discretion paid at year end but without further detail. At least in some years PMW paid Mr de Billot annual bonuses, which Mr Powers describes as substantial.

### **PMW declared Mr de Billot's position redundant**

[26] PMW had initiated a restructuring exercise with a week's consultation period from 11 August 2020. The company proposed to disestablish Mr de Billot's position

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<sup>4</sup> Employment agreement, cl 12.2.

and replace it with an independent contractor role. Mr de Billot sees this coming about after he questioned his shareholding situation.

[27] On 24 August 2020 Mr Powers had a discussion with Mr de Billot, informing him that his job was redundant. This was confirmed by letter, offering Mr de Billot the option of payment in lieu of the one month notice period. Mr de Billot chose to be paid in lieu, notifying the company of this on 25 August. He did not work out his notice and was not put on garden leave.

[28] A schedule of equipment which Mr Powers understood to be in Mr de Billot's possession was attached to the termination letter. In addition Mr Powers asserts that Mr de Billot possessed company information including supplier contact information, and technical manuals although these were not listed in that schedule.

[29] PMW claims that on 25 August Mr de Billot deleted sales invoices from the Xero accounting system of over \$10,000 value, after forwarding copies to his own personal email address.

[30] On 26 August 2020 PMW cut off Mr de Billot's access to his work email address and to the company's Google Drive. Also, Mr Powers arranged for the Xero password to be reset.

[31] The parties fell into disagreement about the return of property and what was owed to Mr de Billot. Lists of property claimed and property held were exchanged. Eventually PMW hired a collection agent and, after some objection from Mr de Billot, the company ute was returned.

[32] On 5 September 2020 Mr Powers notified Mr de Billot in writing that he was concerned Mr de Billot was attempting to steal his agencies and that he should stop contacting the suppliers. A police report was filed. A further list of property Mr Powers regarded as outstanding was sent to Mr de Billot's employment lawyer.

[33] The two lists included equipment and computers. A collection agent later picked up some tools and equipment which Mr de Billot agreed to provide.

[34] As detailed below, some items provided to Mr Powers were not actually the correct items.

[35] After his termination Mr de Billot serviced plastics machines as requested by specific clients, including those previously serviced by him as a PMW technician. Mr Powers says this required the use of confidential information including manuals, technical drawings and specialised equipment, which Mr de Billot disputes. Mr de Billot set up his own company, DDB Services Limited.

[36] On 10 September 2020 there was contact between Mr de Billot and a company referred to as A, which was a PMW customer. The customer A attempted to deal with Mr de Billot for the supply of plastics machinery. Mr de Billot's evidence is that A contacted him, asking for technical assistance as they had contacted Mr Powers and not been able to get an answer.

[37] On 7 October 2020 on his behalf Mr de Billot's friend returned some equipment to PMW.

[38] Mr Powers refers to taking steps to minimise the risk to the business by contacting clients and suppliers to confirm arrangements going forward and secure sales transactions that were pending. Client A's deal was processed through PMW as sole distributor with the company seemingly not suffering any direct loss.

#### **Mr de Billot's claims outlined**

[39] Turning now to the amounts Mr de Billot claims PMW still owes him.

[40] The pay arrangements between the parties were not straightforward. There were elements of monthly pay, pay being split for deposit into two accounts, pay being determined on a net basis, as well as changes in rates of pay and bonuses. Some irregular payments may have reflected discussions on Mr de Billot becoming a PMW shareholder. All of this occurred in the absence of satisfactory records.

[41] Mr de Billot now seeks:

- (a) payments relating to his work on public holidays;
- (b) unpaid wages of \$51,862.90 gross (\$36,790.18 gross plus \$15,072.72 gross); and
- (c) general damages for late payment of his final pay.

[42] Mr Powers expresses confidence that Mr de Billot was paid all that he was entitled to and argues PMW actually overpaid him in his final pay. The company decided to take a conservative approach, paying Mr de Billot if there was any doubt. Any overpayment is not claimed by the company.

[43] As noted above, Mr de Billot's original claim in the Authority had a different focus on annual leave and salary in lieu of notice. I place limited weight on the absence of a claim by Mr de Billot at an earlier stage to the entitlements currently sought, given the complexity of the pay arrangements and the problems with records.

### **PMW's records inadequate**

[44] On the evidence before me PMW did not keep anything close to being describable as wages and time or holiday and leave records whilst Mr de Billot worked for it.

[45] From part way through the relationship Mr de Billot started keeping his own records of work but he did not tell Mr Powers this or show them to him.

[46] Both parties provided the Authority with tables setting out what they understood was paid and received, largely compiled from bank statements and basic information held by PMW and its accountant. These were not contemporaneous records.

[47] Mr de Billot's salary did increase over the period he worked for PMW but there is no documentation of variations to the employment agreement or other written communication setting out pay increases. Mr Powers describes these increases as reflecting Mr de Billot's contribution and PMW's growth.

### **Mr de Billot's holiday claims established**

[48] Mr de Billot says that he was required to work on four public holidays, was not paid additional half time for the days nor given an alternative holiday, as required by ss 50 and 56 of the Holidays Act 2003. These days were primarily identified on the basis of his own record of hours worked.

### *Obligation to work*

[49] Generally Mr de Billot worked Monday to Friday although Mr Powers acknowledges that sometimes there was a requirement for overtime work to service

machines after hours. Service work usually required visits to customers' premises. At some customers' sites Mr de Billot had the ability to enter after hours to access and service machines.

[50] Mr de Billot worked autonomously, particularly when Mr Powers moved to Australia for a period to operate the PMW Australia business.

[51] PMW disputes any requirement to work on public holidays as Mr de Billot was self-managing and there should have been no need to work on those days. Mr Powers was not aware of Mr de Billot working on public holidays and was never asked to approve such work.

[52] PMW sees any public holiday hours as voluntary. The company did not usually provide servicing for clients after hours or on public holidays. It is therefore unlikely work was done on those days. PMW kept job records for billing purposes through a system called Tradify. Those records do not show work on the days claimed.

[53] Mr de Billot disputes the relevance of whether the work was voluntary. Rather he sees the question being whether he actually worked. The employment agreement requires payment for work done on a public holiday to be at time and a half, consistent with the Holidays Act.<sup>5</sup>

[54] The employment agreement speaks of payment for work as does the Holidays Act, rather than any approval criteria. If work was actually undertaken Mr de Billot is entitled to be paid for the work and receive an alternative holiday.

### *Records*

[55] The claim is complicated by PMW not maintaining a holiday and leave record, as required under s 81 of the Holidays Act. The record should have set out any public holidays Mr de Billot worked on, how much was paid for those days, alternative holidays he was entitled to and whether he took any such holidays.

[56] Mr Powers' evidence was that he expected Mr de Billot to keep his own records about holidays. The basis for this appears to be that Mr de Billot was self-managing

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<sup>5</sup> Employment agreement, cl 8.2. Holidays Act, s 50.

but there were no instructions to him to keep his own records including for public holidays worked.

[57] Under the Holidays Act the records obligation is clearly on the employer.

[58] Given the absence of such records the Authority is entitled to find the failure prevented Mr de Billot from bringing an accurate claim and accept as proved his claim about the public holidays worked.<sup>6</sup> I factor that into my assessment of this claim.

[59] From Mr de Billot's personal records, he asserts that he worked on Waitangi Day and Queen's Birthday in 2018 and Auckland Anniversary Day and Labour Day in 2019.

[60] Mr Powers accepts that on Labour Day 2019, although he did not require Mr de Billot to work as such, Mr de Billot may have worked. It was not a public holiday in Europe where Mr de Billot was attending a trade show. No specific hours are recorded on Mr de Billot's records for the period he was away, but he does note his overseas travel.

[61] The Tradify job records only recorded chargeable services or maintenance jobs. Jobs such as reworking an earlier job, installing machinery for which commission is paid or sales and delivery of parts were not recorded.

### *Conclusion*

[62] Standing back and looking at the evidence, I accept that Mr de Billot worked these four public holidays. At times on public holidays Mr de Billot responded to enquiries from Mr Powers and PMW's clients, ordered stock and undertook limited servicing work. Most of this work would not be reflected in the Tradify records. One of the days claimed was when Mr de Billot was at the European trade show.

[63] PMW paid Mr de Billot's usual salary for the periods the public holidays fell within. He was thus paid for the days themselves but only at the ordinary rate of pay. PMW did not pay him for the additional half time which is required for work on public holidays nor for alternative holidays.

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<sup>6</sup> Holidays Act, s 83.

[64] If the Authority finds that Mr de Billot is entitled to additional payment (which is denied), PMW does not dispute the method of calculation claimed. The daily rate is \$439.39 gross. Effectively four days at half time is two days' pay, plus four alternative holiday days, amounts to six days' pay, namely \$2,636.34 gross. PMW is ordered to pay Mr de Billot \$2,636.34 gross within 28 days of the date of this determination.

### **Unpaid wages sought**

[65] Mr de Billot claims that he was not paid wages he should have been during his PMW employment or that his wages were unilaterally reduced. These are now summarised as:

- (a) Unlawful reduction, or non-payment, of wages in the periods April 2016 to February 2017 and then January 2018 to July 2019; and
- (b) An unlawful deduction of wages in February 2019, being due \$11,088.75 gross but only receiving \$6,000 net.

[66] PMW's position is that Mr de Billot was paid an annual salary in instalments throughout the financial year and a discretionary bonus at the end. The company acknowledges that in some months Mr de Billot was not paid the usual monthly instalments, but these were made up by larger payments in subsequent months.

[67] From 2013 Mr de Billot's contractual salary was \$48,000 per year or \$4,000 per month. In practice PMW paid Mr de Billot's salary payments based on net amounts, as indicated by the rounded amounts shown in his bank statements. Mr de Billot appeared agreeable to this arrangement. Seemingly the company's accountant grossed up the net figure to determine the PAYE to be paid to IRD. However, I have no documents from the accountant.

[68] For a period of his employment he received his pay split across his bank account and a joint bank account in the name of himself and his wife. There was a suggestion by Mr de Billot that his wife undertook some work effectively for PMW, either directly and/or by way of supporting him with his PMW work. Ultimately however, I conclude the money paid into the joint account was for Mr de Billot's work.

### **Wages owing for April 2016 to January 2017**

*Was there a variation increasing salary?*

[69] Mr de Billot's claim for this period includes an argument that from late 2015 he received a salary increase which PMW did not then continue to pay. PMW argues that he was still on his salary of \$4,000 net a month.

[70] In two of the four months leading up to April 2016 the amount Mr de Billot received was \$7,353.38 gross - December 2015 and February 2016. He was paid less in January 2016. No claim is made for that month as it was outside the limitation period. In March 2016 Mr de Billot was paid more than \$7,353.38, being the annual bonus payment including his monthly pay according to Mr Powers' oral evidence.

[71] For Mr de Billot it is argued that, on the basis of *Fernandez v Rappongi Excursions Limited*, if an employer offered higher pay, no formal acceptance by the employee is needed each time their pay increases, with the variation being effective by the employee's acceptance shown by their conduct of continuing to work.<sup>7</sup> Mr de Billot kept working hence agreed to the variation and the amount cannot be unilaterally reduced.

[72] PMW does not accept that there was a unilateral deduction nor a variation. Mr de Billot's salary was delayed due to the company's cashflow issues but the shortfall has since been remedied.

[73] I am not persuaded that this is a variation situation. There was no discussion about a variation of Mr de Billot's rate of pay. There was no evidence, other than payments, of PMW intending to offer a higher rate. There were only two payments at a higher rate, separated by a month with a lower payment. Mr de Billot continued to work but it is not even apparent that he was aware of these larger payments at the time, just as he seemed to be unaware a little later that there were two months without any payment.

*Underpayments made up by other payments or bonus/es?*

[74] I go on to consider whether PMW still owes Mr de Billot some money for payments under the \$4,000 net level in this period. The company paid more in some months, now explaining that as making up for the shortfalls and/or bonuses. From

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<sup>7</sup> *Fernandez v Rappongi Excursions Limited* [2019] NZEmpC 99 at [53], citing *Owen v McAlpine Industries Limited* [1999] 2 ERNZ 819 at p 837.

February 2017 PMW says it started paying salary at the increased monthly level of \$6,000 net.

[75] PMW acknowledges that in the months of April, May, June and August 2016 and January 2017 Mr de Billot was paid less than his \$4,000 net monthly salary. However, in July, September, October, November and December 2016 he was paid more than \$4,000. On 4 April 2017 Mr de Billot was paid two extra payments of \$7,985 net, which is said to cover any shortfall in previous months.

[76] PMW's argument for the shortfalls being made up by higher salary payments in other months or the bonus/es, would be stronger if it had been clear at the time what the purpose of the pays were. There was little or no evidence of any oral indications to Mr de Billot and no written evidence.

[77] The suggestion that subsequent months included compensation for the previous underpayments does not fit particularly well with the payment pattern. There was a \$1,000 underpayment in April 2016, and non-payments of \$4,000 each in May and June 2016. The next payment was only \$103 above the correct salary rate, suggesting that it may be some other payment, such as a reimbursement. It certainly would not go very far towards the \$9,000 outstanding. There were a couple of other larger payments but they also go nowhere near covering the outstanding amount.

[78] PMW's position is not much stronger regarding the bonus payment in March 2017. Without evidence of PMW's profits or calculations of the annual bonus to be paid to Mr de Billot, I do not have a basis for concluding that the bonus payment made up for any underpayments in salary. Despite an accountant apparently assisting at the time, no evidence was produced about how the calculations were made.

[79] In his oral evidence Mr Powers was unclear about what the year end payments comprised. He admitted he did not disclose to Mr de Billot how those payments were calculated nor did he keep any specific records of short payments.

[80] The effect of his evidence was that it was not possible to identify what portion of the year end payments represented profit share as against short payments in salary.

[81] In the absence of supporting evidence, I am entitled to reach the view that the financial end of year payments were purely bonuses in addition to the usual pay and

should not be treated as compensating Mr de Billot for the unilateral reductions to his pay.

*Conclusion*

[82] Frankly, the parties' agreements, understandings and actions are clouded.

[83] I conclude that there was not a variation to Mr de Billot's salary in late 2015. It appears on occasions Mr de Billot expressed the need for more money and he would get additional (seemingly lump sum) payments.

[84] PMW did not pay Mr de Billot his salary of \$4,000 net per month consistently in the period from April 2016 to February 2017. There are underpayments and PMW has not established that they were compensated by overpayments in the period or the bonus in March 2017.

[85] The amounts I conclude as owing are:

April 2016	\$1,000 net
May 2016	\$4,000 net
June 2016	\$4,000 net
August 2016	\$1,000 net
January 2017	\$1,000 net
<b>TOTAL</b>	<b>\$11,000 net</b>

[86] PMW is to pay Mr de Billot \$11,000.00 net within 28 days of the date of this determination.

**No wages outstanding for the period January 2018 to July 2019**

[87] PMW accepts that from February 2017 Mr de Billot was receiving pay of \$6,000 net a month. This equated to a gross monthly payment by PMW of \$7,991.

[88] For many months in the period from January 2018 to July 2019 Mr de Billot was paid less than the net equivalent of \$7,991 gross and claims that he was short paid \$15,072.72 for this period.

[89] What happened was income tax rates were reduced, so PMW ended up paying less in total but Mr de Billot received the same amount in his hand.

[90] Mr Powers was of the view that Mr de Billot agreed to be paid \$6,000 net so when tax rates changed the gross payment decreased but net payment continued at the same rate. The parties' arrangements proceeded on the basis of net total amounts being paid. Mr de Billot appeared to have no problem with that arrangement. In his evidence he had some difficulty articulating what was being claimed here.

[91] The parties did not turn their attention to what would happen if tax rates went down or up for that matter.

[92] Submissions for Mr de Billot suggest that there was an obligation to bring income tax amendments to his attention. The difficulty is that, while a good faith obligation could potentially be envisaged when a net rate payment agreement exists, that does not assist with an argument that Mr de Billot should effectively get all (or even some) of the difference due to the tax change, rather than PMW. I do not have the ability to fix new terms and conditions of employment.<sup>8</sup>

[93] I conclude that such agreement as there was, was for a net payment. I do not accept that the "profit" of changing tax rates can necessarily be said to have to pass to Mr de Billot. This claim is not established.

### **February 2019 deduction**

[94] A non-contemporaneous table Mr Powers prepared of monthly gross wages payments and PAYE shows Mr de Billot was to be paid \$11,088.75 gross for February 2019. Deducting the PAYE figure listed meant Mr de Billot would have received \$8,039.86 net. He in fact received \$6,000 net. Mr de Billot claims that by PMW's own assessment records he was underpaid or had a deduction made of \$2,039.86 net for the month.

[95] PMW says it did not make any deductions from salary in February 2019 as Mr de Billot was paid his usual net salary of \$6,000 per month. Mr Powers describes preparing the table from IRD records. He confirmed the table was correct but on further

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<sup>8</sup> The Act, s 161(2)(b).

review against the bank statements, discovered some errors. The February 2019 deduction was such an error.

[96] I recognise the difficulties of working out what Mr de Billot's entitlements were and what is owing. However, I am not satisfied that there is a compelling basis to establish that Mr de Billot is owed this money.

### **Late payment of final pay**

[97] For Mr de Billot it is submitted that his final pay was due as soon as his employment was terminated, with reference made to the obligation to pay holiday pay with final pay under s 27(2) of the Holidays Act. He says his employment was terminated on 25 August 2020 so his final pay was due immediately after that date, or in any event no later than around 1 September 2020, being the pay date relating to his final period of employment.

[98] PMW did not pay Mr de Billot his final pay until 29 September 2020. Mr de Billot claims to have suffered distress by that late payment and seeks of general damages for breach of contract.

[99] Connected with the question of when the final pay was due were questions of when Mr de Billot's employment started and finished and whether his salary had been paid in arrears or in advance. Ultimately I do not consider that these questions need to be explored in great detail to answer the damages claim.

[100] The company's contractual duty was to pay monthly on a Friday. Which Friday is not specified.

[101] The parties agree that salary was usually, but not always, paid in the first few days of the month. They disagree on whether it was paid in arrears or in advance.

[102] Mr de Billot argues that his agreement ended on or about 25 August 2020, the day he notified Mr Powers that he elected to be paid in lieu of working out his notice.

[103] PMW acted consistently with Mr de Billot's election by cutting off his email and Google Drive access on 26 August 2020 and advising staff on the same day that his termination had happened the day before. In oral evidence Mr Powers accepted Mr de Billot's employment ended on 25 August 2020.

[104] The company accepts that even if the notice period was seen as continuing to run after Mr de Billot's election, the payment was not made until a few days after that period.

[105] For the sake of argument I am prepared to accept that there was late payment of wages amounting to a breach of contract.

### **No damages awarded**

[106] The final pay was a substantial sum, although had the employment continued it would only have been the monthly amount paid in early September. Mr de Billot identifies the delay in payment as causing difficulties with him having to borrow funds from family and apply for a loan from his bank. His evidence was that this was stressful.

[107] Mr de Billot seeks \$10,000 general damages for what he experienced as distress and worry. He relies on *JCE v Chief Executive of the Department of Corrections*.<sup>9</sup> That case concerns a breach of the duty to provide a safe workplace with serious consequences - a prison officer being violently assaulted and suffering post-traumatic stress disorder.

[108] That is quite a different situation to this. Even if general damages were available in such a situation, I struggle to see sufficient evidence of Mr de Billot suffering detriment arising from the timing of his final pay such that it would justify a general damages award. This claim is not established.

### **Interest is owing**

[109] Interest is sought on the outstanding amounts. I accept that interest should be paid on the amounts owing from 4 September 2020, being the first Friday in September, to the date of payment. This is to be calculated in accordance with the Ministry of Justice's civil debt interest calculator.<sup>10</sup>

### **PMW's claim initiated after activities of Mr de Billot's new business**

[110] I now move to look at PMW's issues. Events in mid 2021 appear to be the trigger for the company's claim being lodged. These included Mr de Billot seeking an

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<sup>9</sup> *JCE v Chief Executive of the Department of Corrections* [2020] NZEmpC 46.

<sup>10</sup> <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

updated quote from one of PMW's suppliers for a PMW client, although the sale ended up going through PMW as sole agent. Another event was Mr Powers' discovery of a OneDrive account accessible through Mr de Billot's PMW email address. More on that later.

[111] At the time of the investigation meeting Mr de Billot was the only New Zealand based qualified injection moulding technician for two brands. PMW has sole distributorships for plastics machinery manufacturers but that does not prevent a third party from servicing the machines.

[112] Mr de Billot accepts he now has many customers in his business that he used to work with when at PMW. He approached some, he says using publicly available information and requesting contact details of those who he dealt with previously, to inform them he was going out on his own. Some former customers contacted him, including via social media.

[113] Mr de Billot is aware that he was not an agent for the suppliers with whom PMW has a sole distribution agreement and this limits what he can do. If he orders parts or machinery from suppliers for whom PMW is the agent, the company gets the commission.

[114] Mr Powers was particularly concerned that Mr de Billot was attempting to jeopardise PMW's relationship with its supplier B. However, as noted in the first determination, Mr de Billot no longer owes a duty of fidelity to PMW and subject to not breaching any other obligations, he is entitled to seek to take away business from PMW. There was no restraint of trade.

[115] These dealings with customers which sparked the seeking of interim orders were not the focus of the substantive investigation meeting. Rather the focus was on whether Mr de Billot has PMW's information and whether it is confidential, along with unreturned tools.

[116] Mr de Billot denies using any of PMW's confidential information in his dealings with clients or suppliers and says all PMW's tools were returned.

## **PMW's devices**

[117] When working for PMW, Mr de Billot had several PMW computers, laptop and desktop, from his work at home.

[118] There was a delay in the return of PMW's devices to it after Mr de Billot was given notice of termination. Mr de Billot, via his friend, returned a Dell computer to PMW. Mr Powers says the computer returned was not the computer PMW provided to Mr de Billot. Prior to the investigation meeting Mr de Billot indicated the wrong computer was returned "by accident". He now accepts it is possible he returned the wrong computer on purpose.

[119] After some further weeks Mr de Billot returned what appeared to be the correct computer but Mr Powers says when he opened it, it did not have a SSD (solid state drive, an external hard drive) incorporated as it should have. Rather it had a hard drive which contained no files. Mr Powers says that a copy of PMW's entire electronic file system could be saved on the SSD and this is not challenged.

[120] Similarly, with Mr de Billot's work mobile phone, he gave one phone to the collections agent but it was not the right one. His friend dropped off the correct one almost three weeks later. Mr Powers thinks this was to allow Mr de Billot more time to access information although PMW did not seek an analysis of the phone to see if this could be established.

[121] Mr Powers believes the delays and return of an incorrect computer and phone were done to cause confusion and allow Mr de Billot more time to access information on or through the devices.

## **Identification of the OneDrive account**

[122] I now look at evidence regarding the Microsoft OneDrive account – its creation and what material was on it. PMW says the evidence establishes Mr de Billot has deliberately taken its confidential information.

[123] PMW's file system is cloud based on Google Drive, which is accessible by individual accounts from many devices as long as the user has the login based on a PMW email address and the password. While a user is signed in it is possible to copy

information to the device's hard drive or potentially share it with other cloud-based services such as Microsoft's OneDrive.

[124] In August 2021 Mr Powers received an email to Mr de Billot's work email address advising that the OneDrive was full. Mr Powers had been monitoring that email address since Mr de Billot finished.

[125] The message surprised Mr Powers as to his knowledge when Mr de Billot was at PMW he used PMW's Google Drive cloud storage, not Microsoft OneDrive. After Mr Powers received the email about the OneDrive account he changed the password to remove any future access by Mr de Billot.

[126] Mr Powers instructed computer expert Mr Hansen-Beadle to undertake some work. The results showed the OneDrive account contained a number of PMW files or folders which Mr Powers says are the company's confidential information.

[127] It was also discovered that Mr de Billot had stayed in contact with Mr Rostig, who was still working for PMW Australia. They had been friendly and Mr de Billot saw Mr Rostig as having a very good electronic knowledge set.

[128] After he finished at PMW Mr de Billot contacted Mr Rostig occasionally for guidance. This included for customer A. On that occasion Mr de Billot offered to pay Mr Rostig for his assistance, but the offer was declined.

### **Expert evidence of Mr Hansen-Beadle**

[129] On Mr Power's instruction Mr Hansen-Beadle examined a Microsoft 365 account, using Mr de Billot's PMW email address as login, and the OneDrive storage application within that account. In the Microsoft account he found a folder named "Desk Jun 2021". Within it was a sub-folder called "Technical Info Folder". Those folders were dually created on 31 May 2021, meaning they were copied onto the OneDrive on that date.

[130] Mr Hansen-Beadle finds it likely that the "Technical Info" sub-folder was within the parent "Desk Jun 2021" folder when copied to the Microsoft application on 31 May 2021 as the timestamp shows both folders were created within the same minute. This does not help establish where the folders were a located prior to 31 May 2021.

[131] By way of sample, Mr Hansen-Beadle reviewed a PMW terms of trade electronic document within “Desk Jun 2021”, finding it to be created in Mr Rostig’s system before 17 June 2017. It had been modified on the de Billot system on 23 March 2021. A sample of files from inside “Desk Jun 2021” had the creator as Mr Rostig whereas a sample from outside that folder had Mr de Billot as the creator.

[132] Mr Hansen-Beadle found what appeared to be six attempts in August and September 2020 to reset the password for the account.

[133] Several factors lead Mr Hansen-Beadle to conclude that the OneDrive account used Mr de Billot’s PMW email address as a log-in but was not a PMW account. Rather he believes it to be an account which belonged, on a shared basis, to the de Billot household.

[134] Mr Hansen-Beadle concluded on balance that the folder and files of concern, “Desk Jun 2021” and “Technical Info folder”, came into being on the Microsoft account while under the access and control of Mr de Billot on 31 May 2021, well after his employment with PMW finished.

[135] The instructions to Mr Hansen-Beadle had a limited scope. He looked at the metadata which enabled him to identify movement of the Technical Info folder. He was not asked to examine all the files within that folder to see if they had been accessed since it was transferred to the OneDrive account. He did see the one modification made in March 2021, which could have been an addition or deletion.

[136] Mr Hansen-Beadle did not recognise the name “Desk Jun 2021” as coming from an auto save naming convention. This suggests the file was named by the person who moved it.

### **Expert evidence of Mr Chappell**

[137] Mr Chappell examined Mr Hansen-Beadle’s report. He notes that every Microsoft Office 365 account has, by default, a OneDrive account. Microsoft has a default setting to back up files using OneDrive unless this is turned off.

[138] He identifies some limitations to Mr Hansen-Beadle’s report. These include not showing what computer had user profiles, who was using the OneDrive account associated with Mr de Billot’s PMW email address and what device was used to modify

the folders or files on the OneDrive account. The report demonstrates that PMW had access to that OneDrive account and could have accessed the files using that account. The report does not indicate any forensic examination of the computers themselves.

[139] A proposition that the OneDrive account could have by default synchronised with PMW's office accounts was negated as PMW uses Google Drive to store its information, not Microsoft.

### **Conclusion on OneDrive**

[140] Mr de Billot, although denying deliberate taking of PMW's information, acknowledges that, after his employment finished, he had documents from the company on the OneDrive. On his behalf two other possible explanations for PMW's information ending up on Mr de Billot's personal OneDrive account, without requiring deliberate action by him, were offered.

[141] Having considered the expert and other evidence I conclude that:

- (a) The documents on the OneDrive were an intermingling of PMW documents, those relating to Mr de Billot's new business and de Billot family documents;
- (b) Given the automatic synchronising nature of OneDrive, that of itself does not prove deliberateness;
- (c) There was some connection with a younger member of Mr de Billot's family. The OneDrive account was used by the de Billot family;
- (d) On the basis of the evidence of both experts, physical steps had to be taken for the "Desk Jun 2021" and "Technical Info" folders to be copied from PMW's Google Drive to OneDrive, either from one location to the other or via a different location. That would not have happened automatically;
- (e) Deliberate steps were thus taken to transfer those folders;
- (f) The folders could have been on the SSD and transferred from that to the OneDrive but the transfer could also have happened in other ways;

- (g) It is more likely than not that the physical steps necessary for the transfer were taken by or under the direction of Mr de Billot;
- (h) The analysis was restricted, with neither party's hardware provided for forensic analysis; and
- (i) PMW could have obtained more forensic analysis on what it had, which would have identified whether particular folders were accessed and when. It did not seek that information.

### **PMW's information**

[142] In the OneDrive was a considerable amount of PMW material in electronic form, particularly in the Technical Info folder.

[143] Given his contractual obligations to return all PMW's information, material or property, Mr de Billot should return it, with the order set out towards the end of this determination.<sup>11</sup>

[144] I go on now to consider whether he holds confidential information. As set out in the first determination, the recent decision of Associate Judge Bell in *Donovan Group NZ Ltd v Reid* provides a useful summary and guidance on breach of confidence claims, noting the distinction between what can be done during employment and after:

- (a) An employer's confidentiality claims must be stated clearly so that the employee is free to use non-confidential know-how gained while working for the employer;
- (b) The use of information will only be restricted post-employment when it amounts to a trade secret or is so confidential that it requires the same protection as a trade secret;
- (c) The information claimed as confidential must have been imparted to the employee in confidence;
- (d) To be confidential the information must be confidential to the employer and not merely to the customer. It must be confidential as against the customer. The employer cannot, after employment, prevent the

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<sup>11</sup> Employment agreement, cl 12.2.

employee from disclosing it to the customer or the customer from doing the same to the employee;<sup>12</sup> and

- (e) Generally former employees are entitled to contact former customers or suppliers of the employer, with information about key people not being confidential once employment has ceased.<sup>13</sup>

[145] As identified in *Faccenda Chicken Ltd v Fowler* all circumstances are to be taken into account in the assessment of whether information is confidential after termination of employment. It is useful to focus in particular on four factors – the nature of the employment, the nature of the information itself, whether the employer impressed on the employee the confidentiality of the information and whether the relevant information can easily be isolated from other information.<sup>14</sup>

### **OneDrive held confidential technical information**

[146] A main focus of the confidential information claim is on the technical manuals, drawings and other information contained in the electronic Technical Info folder.

#### *Nature of employment*

[147] The parties agree that servicing plastics machinery is a highly specialised area. At least at the time he departed from PMW, Mr de Billot was the sole technician in the country trained in the system of a major supplier.

#### *Nature of information*

[148] The folder contains several types of material including:

- (a) technical information and drawings compiled primarily by PMW technicians (including those in Australia and with predecessor companies) to assist technicians during their work. These are not available publicly; and
- (b) detailed manuals, machine data sheets, electrical drawings and hydraulic diagrams from suppliers, some specific to particular pieces of

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<sup>12</sup> *Nedax Systems NZ Ltd v Waterford Security Ltd* [1994] 1 ERNZ 491.

<sup>13</sup> *Donovan Group NZ Ltd v Reid* [2020] NZHC 3367, including references to *Nedax Systems NZ Ltd v Waterford Security Ltd* as above.

<sup>14</sup> *Faccenda Chicken Ltd v Fowler* [1987] Ch 117.

machinery. I accept customers are also supplied with a machine manual but these are not as comprehensive as those held by PMW. The manuals held by PMW are not publicly available.

[149] An example examined was an alarm code list from a large supplier. When printed this document covers 55 pages of alarm numbers, descriptions and solutions. The manuals provided to customers do not cover all these descriptions which is why customers come to PMW. The supplier specifically tells PMW that the information is not to be revealed to customers.

[150] It was argued that some of the information belonged to suppliers rather than PMW. However, the evidence supported a requirement from suppliers that their information not be passed on to other organisations, including customers.

[151] Two sole agency agreements were provided to the Authority. They contain detailed confidential information clauses. One refers to the obligation being imposed on the agent's employees not to communicate or otherwise make accessible confidential information to third parties.

[152] Mr de Billot accepts that the information of the supplier he did extensive training with was confidential.

[153] Mr Powers describes paying a substantial sum for the service history, technical documents and any intellectual property of the Australian company purchased which became PMW Australia.

*Pressing confidentiality on employee*

[154] Mr de Billot denied having been shown the sole agency agreements. But he admitted knowing there was confidential information belonging to one of PMW's suppliers within the Technical Info material and that there was an obligation on PMW staff to keep that supplier's information confidential.

[155] Mr Rostig told the Authority it was emphasised that the suppliers' information was only available to technicians and not to customers.

[156] One of the technicians spoke of being told earlier in his employment that the information in the Technical Info folder belonged to the principal (supplier) and not to pass it on to other organisations.

### *Separable information*

[157] It seems likely that there may be elements within some particular documents which could be said to be not confidential, mixed with confidential elements. However, I am satisfied that there are some documents within the Technical Info folder which would be entirely confidential.

### *Conclusion*

[158] Mr de Billot was a key employee in the New Zealand PMW business. He was trusted with supplier and technical information. His employment agreement contained a confidential information provision. The Technical info folder holds information that is highly technical, is not in the public domain and is subject to confidentiality provisions in supplier agreements.

[159] I conclude that at least some information in this folder satisfies the requirements of confidentiality and may not be used post-employment.

### **Use of that confidential information**

[160] Mr de Billot had access to the electronic file containing confidential information at least until mid 2021, many months after his employment finished.

[161] Mr de Billot is an experienced technician with intensive training from one important supplier. Whilst I accept that in many instances, as he suggests, he may be able to fix machines through a listen and a look at them or using the customers' manuals, I do not accept that was always the case. Mr de Billot acknowledged that maybe 2 or 3% of the work he currently does would possibly have involved use of something in the Technical Info folder.

[162] The fact he had difficulty fixing complex machine problems is illustrated by his contact with Mr Rostig, without Mr Power's knowledge. Personal phones were used, shielding the calls from PMW. The information was clearly valuable as Mr de Billot offered to pay Mr Rostig for his time and expertise, although the offer was rejected.

[163] The return of the wrong devices and delays in ensuring all devices went back to PMW adds to the concern.

[164] I conclude that it is more likely than not that Mr de Billot used confidential information after his employment with PMW ceased. In the absence of further forensic information or other evidence that is as far as I am prepared to go at present. It was agreed that damages would not be considered at this point. If PMW wishes to pursue its damages claim rather more evidence would likely be needed to link the information, Mr de Billot's actions and any losses by PMW.

### **Other information**

[165] PMW's strongest arguments concern the technical information. Other information was either likely not characterisable as confidential information or not sufficiently established as being used by Mr de Billot.

[166] I am not satisfied that information that was more customer focused was established to be confidential information. In some instances, for example, Mr de Billot was able to seek an updated quote for PMW clients or former clients because they supplied him with the original quote from PMW. He could then go to the supplier.

[167] There are restrictions on employees taking lists of contacts when leaving employment. The OneDrive held a list of contacts from Mr de Billot's work phone although there is a question about which period it was from.

[168] Given the nature of the job and industry it is credible that Mr de Billot was able to recall the names of at least key contacts in supplier and client organisations. He had legal representation. Mr de Billot says he was advised to use publicly available means to contact customers such as companies' websites to make contact or using the first name/last name pattern for names followed by the company's web address to make email contact. In addition he is friends on social media with some people and contact was made that way.

[169] It is also believable that clients would want to deal with Mr de Billot who they previously dealt with for some years and who has technical expertise. He is entitled to exploit that expertise in his own business. PMW may wish to prevent any contact between Mr de Billot and its customers but that is not sufficiently provided for in the employment agreement.

[170] Even if, as Mr Powers claims, there is confusion amongst suppliers or customers regarding whether Mr de Billot currently works for PMW or someone else, that does

not of itself provide a basis for establishing that he has breached his confidential information obligations.

[171] Former employees not under restraint of trade or non-solicitation provisions are generally entitled to contact former clients or suppliers.<sup>15</sup> I am not persuaded that it is established Mr de Billot breached any obligation in relation to confidential information in this regard.

**Mr de Billot copied invoices to personal email address then deleted them**

[172] Another element of PMW's claim is that Mr de Billot copied and deleted invoices which were PMW's property.

[173] Mr Power's evidence was that between 8.46pm and 8.51pm on 25 August 2020 Mr de Billot deleted six sales invoices from Xero to the value of \$11,080.25 having forwarded copies of them to his personal email address. The history recorded on the invoices provided to the Authority supports five invoices being deleted by Mr de Billot at that time. A sixth was deleted on 3 August 2020.

[174] Until the investigation meeting Mr de Billot had not accepted actions of deleting invoices. At the meeting under questioning he acknowledged going through quite a bit of trauma at this time, feeling like the rug had been pulled out from under his feet with Mr Powers refusing to return his personal property or the substantial sums of money he had put into the business. He did not explicitly admit deleting the invoices, saying he could not remember what transpired but if he did it may have related to a situation where a customer disputed an invoice which should have been free as it was rework.

[175] I find it unlikely that there were six invoices of this nature at one point in time, particularly when some were created a few months before. Also, one of the invoices is only for parts, not fitting particularly well with the rework scenario. I find it more likely than not that Mr de Billot sent these invoices to himself and then deleted them in a state of upset.

[176] PMW was able to recover at least most of these invoices so not harm was demonstrated to have been suffered. It is suggested that loss was suffered on one

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<sup>15</sup> *Donovan Group NZ Lid v Reid* as above, referring to *Nedax Systems NZ Ltd v Waterford Security Ltd* as above.

invoice where it related to a warranty claim. That will need to be established if PMW wishes to pursue damages on that matter.

### **Other property - SSD Drive**

[177] I will first deal with the SSD which is potentially connected with OneDrive matter before looking at physical property in the form of tools.

[178] Mr Powers claims he had installed an SSD into the computer which had been used by Mr de Billot and that the drive was never returned. Mr de Billot says he bought the SSD, gave it to Mr Powers after the latter returned from Australia but it was never installed.

[179] PMW's evidence and arguments regarding the SSD was not entirely satisfactory. Mr Powers' affidavit evidence was that he had purchased the drive himself and installed it before passing the computer on to Mr de Billot. Later in that affidavit he stated he installed the drive after returning from Australia. He later changed his position accepting that he had not bought the SSD.

[180] I did not find compelling PMW's submissions that there was no record of the SSD being returned to the company by Mr de Billot. PMW did not provide the Authority with any assets register or the like and there is no evidence of the company keeping any records of when property was physically transferred between Mr Powers' home office and Mr de Billot's home or work vehicle.

[181] From at least September 2021 Mr de Billot's position that the SSD had never been installed was clear. PMW had the opportunity to instruct a forensic examination be undertaken on the returned computer which may have shown whether an SSD had previously been operating with it, including supporting Mr Powers' theory that information had been copied to the SSD. PMW chose not to order that analysis.

[182] In these circumstances I make no order regarding an SSD.

### **Email and Tradify evidence does not assist PMW**

[183] For this investigation Mr de Billot produced one 2013 email which he identifies as finding on an old work computer. The legitimacy of his retention of this old computer was not disputed by PMW. The company did argue that the provision of this

email demonstrates that he had access to all PMW emails. I found that a step too far in the absence of other evidence.

[184] PMW was unhappy with Mr de Billot having Tradify records. However, on the evidence before me, Mr de Billot sought Tradify records, after he finished with PMW, directly from Tradify. He used the records as part of his preparation for the Authority proceeding.

[185] Given the difficulties with PMW's wages and time and holiday and leave records I make no criticism of Mr de Billot seeking these records. Through the proceeding PMW has these records. If it seeks additional records presumably it can directly obtain them through Tradify.

### **No order about return of tools**

[186] PMW alleges that Mr de Billot misappropriated company property and seeks the return of it. Mr de Billot maintains that he has not retained any PMW tools.

[187] Mr de Billot's delay in returning the property he did hold, did not assist in giving PMW peace of mind that everything was properly returned. On the other hand equipment was not immediately needed by PMW as it had no one else in New Zealand who was trained to use it. Also, PMW delayed in paying Mr de Billot outstanding holiday and other entitlements whilst there were communications between the parties seeking resolution.

[188] Mr de Billot was obliged under clause 12.2 of his employment agreement to immediately return all information, material and property belonging to the employer.

[189] PMW's systems for recording its property were not robust. Under circumstances where an employee was working from the employer's premises this may not be particularly problematic. Here however Mr de Billot was primarily based at his own home. Clearly during his employment he legitimately held PMW equipment for use in the company's operations.

[190] As a trained mechanic Mr de Billot was used to owning and using his own tools. When he returned to New Zealand in 2013 he shipped back a substantial amount of tools. In around 2019 Mr de Billot's home was broken into and a number of items stolen.

### *Torque wrench*

[191] This is a large tool.

[192] PMW emphasises that in the communications after Mr de Billot finished work he said he would return a torque wrench. The company says he later changed his mind and decided not to return it, with it being more likely that Mr de Billot realised it would be useful in his new business.

[193] Mr Powers initially claimed that customers would not have their own tool this size, that being why PMW initially bought it. However, he accepted in questioning that they could have some of their own tools.

[194] Mr de Billot's evidence was that he initially believed he had this in his possession so had indicated he would return it. Later he discovered he could not find it. He denies keeping it for his own business. He says it was only used infrequently, once or twice a year and only for one customer. Customers do a substantial portion of their own repairs, only calling PMW in for more complex problems. Mr Powers did not dispute this.

[195] I am unable to conclude that Mr de Billot has the torque wrench.

### *Compressor*

[196] Mr de Billot identified that he did not need a compressor as customers had their own compressors on site. He last recalled seeing the compressor in a self-storage lockup used by PMW. The size made it unlikely he would have kept it in his garage whereas Mr Powers had an area for parts and a double garage at home.

[197] Mr Powers accepted in oral evidence that the compressor had been stored the lockup but that both he and Mr de Billot has emptied that lockup. He was not aware where the compressor had gone after that time.

[198] I cannot conclude that Mr de Billot had the compressor so make no orders regarding it.

*Fluke multimeter*

[199] Mr de Billot identified that this item was damaged when a steel pole fell on it. And he reverted to using his own multimeter. It seems the breakage was not reported to Mr Powers who was based in Australia at the time.

[200] I cannot conclude that Mr de Billot has PMW's multimeter intact and so make no orders regarding it.

*ASCHO boxes*

[201] Mr Powers' oral evidence was that these were old calibration tools which he had not seen for over five years. Mr de Billot says that he last saw these items about three or four months before he was terminated in a plastic box on a shelf in Mr Powers' house which was used as their spare parts and storeroom.

[202] Mr Powers suggested the tools were needed for a particular job in August 2020. Mr de Billot's evidence was that there were other ways to test for faults. Mr Powers admitted the other man had far greater experience in knowing what was required to fix and service machines that Mr Powers had.

[203] I cannot conclude that the ASCHO boxes were in Mr de Billot's possession and so made no orders regarding them.

*Rexroth extension*

[204] Mr de Billot's evidence was that this tool was no longer needed as it was an old calibration tool which had been superseded by newer technology. He denies having it. Mr Powers does not accept this is an antiquated tool.

[205] There was no direct evidence that Mr de Billot was in possession of this tool at the time of his termination. Mr Powers acknowledged there was no PMW record showing when property was disposed of.

[206] I cannot conclude that this tool was in Mr de Billot's possession and so make no orders regarding it.

### *Chainsaw*

[207] Mr de Billot says that during the burglary two chainsaws were stolen. One belonged to PMW and the other to a mutual friend of Mr de Billot and Mr Powers, which Mr de Billot had been servicing. Mr de Billot used insurance money as a gesture of good will to buy a chainsaw for the mutual friend who was a business connection.

[208] Mr de Billot does acknowledge that he currently has a chainsaw in his possession, but it belongs to a friend.

[209] Mr Powers acknowledges being told that the chainsaw had been stolen but understood insurance money was used to buy another.

[210] The evidence that PMW's chainsaw was in Mr de Billot's possession is inadequate so I make no orders regarding it.

### *Conclusion*

[211] I am not satisfied that there is sufficient evidence of any of the property identified by PMW being in Mr de Billot's possession.

[212] Mr de Billot provided detailed and specific explanations regarding various property items. At times he used his own tools for PMW work.

[213] PMW did not have an inventory of tools it owned or carry out any regular audit on such items. The company could not be certain about the movement of items and when they might last have been used or located. This was in a situation where an employee was primarily working from home and at customers' premises in a tools intensive industry. Tools were seemingly kept in Mr de Billot's work van, at his house, at Mr Powers' home offices, parts storage area and double garage. Mr Powers was not familiar with all the tools in detail.

[214] An example concerns an LED torch. Mr de Billot's evidence, that he returned an LED torch and identification of it in a photo of returned property, was persuasive and ultimately not challenged by PMW. Mr Powers conceded about the torch during his evidence, accepting that he did not know what it looked like and so could not recognise it in the photos of what was returned to the collection agent.

### **Further property findings not made**

[215] There were some extra items which had initially been pursued by PMW. However, closing submissions on behalf of the company identified that it:

- (a) does not seek the return of Ideal Electrical parts purchased on 21 August 2020, the LED torch or Inside Mic Calibration tool;
- (b) does not intend to pursue the value of the thermal camera returned damaged; but
- (c) does seek a finding of fact in relation to whether these items were returned in a satisfactory manner consistent with Mr de Billot's obligations under his employment agreement. This may be relevant to penalties or damages claims.

[216] I am not prepared to make further findings on these matters. The LED torch was returned. The issues of the use of parts and any level of culpability for any damage to the thermal camera were not well explored in the investigation meeting, as PMW's intention to seek penalties or damages in these regards was not clearly signalled.

[217] I also note the reference in the submissions for Mr de Billot to it being questionable whether employers can sue employees for unintentional or negligent damage to property in light of the comments of Judge Inglis, as she then was, in *George v Auckland Council* and *Rainbow Falls Organic Farm Limited v Rockell*.<sup>16</sup>

### **No findings regarding duty of loyalty and fidelity**

[218] Closing submissions for PMW provided after the investigation meeting argued that Mr de Billot had breached his implied duty of loyalty and fidelity to PMW. This was said to cover delays in returning computers, inappropriate accessing and destruction of the invoices. Mr de Billot objects to the reliance on that duty when it was not identified in PMW's statement of problem and not raised when at the start of the investigation meeting I outlined and clarified the issues to be investigated. I accept that and make no findings regarding this duty.

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<sup>16</sup> *George v Auckland Council* [2013] NZEmpC 179 at [147] and *Rainbow Falls Organic Farm limited v Rockell* ;2014] NZEmpC 136 at [57] – [58].

## **Injunction/compliance order**

[219] The interim order made in the first determination is discharged. I asked PMW to specify the permanent order it sought and this was done in closing submissions. The order sought focuses on the return of PMW's property and information along with confirmation that all copies in his possession have been deleted.

[220] Given that the focus is on the return of property I consider that the most appropriate order is a compliance order based on clause 12.2 of the employment agreement.

[221] I order that within 14 days of the date of this determination Mr de Billot is to comply with clause 12.2 of his employment agreement with the company by returning to PMW all PMW property and information held by him, whether in hard copy or electronic format including:

- (i) Supplier technical information, servicing information prepared by PMW technicians, diagrams, instruction manuals, information relating to spare parts; and
- (ii) Customer and supplier information including contact details and text messages and emails.

[222] For the purposes of clarity, this does not include information held by representatives of Mr de Billot for the purposes of the Authority or High Court proceedings.

[223] PMW also seeks that Mr de Billot be ordered to provide what is essentially a warranty or undertaking confirming that he has returned all the property. It does not identify the basis for such an order and I make no order in that regard.

[224] In the event that there is any difficulty with the implementation of the order made, the parties are able to return to the Authority.

## **Summary of orders**

[225] PMW is to pay Mr de Billot within 28 days of the date of this determination:

- (a) \$2,636.34 gross for public holiday and alternative holiday pay;
- (b) \$11,000 net for unpaid wages; and

(c) Interest on those sums from 4 September 2020 until the date of payment.

[226] Within 14 days of the date of this determination Mr de Billot is to comply with clause 12.2 of his employment agreement with the company by returning to PMW all PMW property and information held by him, whether in hard copy or electronic format.

**Costs and next steps**

[227] Costs are reserved.

[228] I am considering whether to direct the parties to mediation again given that whilst some issues have been resolved, some remain outstanding. The parties are to advise the Authority within 14 days of the date of this determination what their views are on further mediation.

Nicola Craig

Member of the Employment Relations Authority