

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 175
3119434

BETWEEN CALEYS LIMITED
Applicant

AND SHAUN OSBORNE
Respondent

Member of Authority: Robin Arthur

Representatives: Cyril Pepper for the Applicant
Darrell Osborne for the Respondent

Investigation Meeting: 1 March 2022 in Tauranga

Determination: 3 May 2022

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Shaun Osborne must pay Caley's Limited the sum of \$1,289.46.**

Employment Relationship Problem

[1] Caley's Limited (Caley's) sought orders requiring Shaun Osborne to pay for personal use he made of a company vehicle provided to him during his employment. Mr Osborne accepted he was liable to pay his personal use of the work van beyond what was permitted under the terms on which he was provided that vehicle. He disagreed however with Caley's calculation of how much of the travel was properly classified as personal use, what rate he should pay for each kilometre and what payment he should make for tolls charged on some roads he had travelled on.

[2] Mr Osborne was employed by Caley's as an installer of window blinds for five months from 21 March 2019 to 23 August 2019. As part of the arrangement for Caley's to provide him with a work van, he signed a company policy which said the vehicle was

to be used for Caleys' business only. The policy also said the van was available to him "to take home each day" and was fitted with a GPS tracker.

[3] A term in his employment agreement said the policy for use of the work van was "to be complied with at all times" and the "most economic routes are to be taken at all times where practical".

[4] Shortly after Mr Osborne's employment with the company ended, Caleys director Cyril Pepper checked the company's GPS records of times, distance and routes travelled in the van. Mr Pepper identified some 79 occasions on 54 days where it appeared to him that Mr Osborne had travelled at times or to places that were not for work purposes or were not solely for coming and going from what the company understood to be his place of residence at the time. The distance travelled on those occasions totalled 2,369.44 kilometres.

[5] Caleys sought payment for that travel at the rate of 79 cents a kilometre, that is \$1,812.93. It also sought two further amounts. One was payment of \$58.90 for road tolls incurred during that travel. The other was \$1,459.33 for what Caleys said was its liability to Inland Revenue in fringe benefit tax (FBT) for Mr Osborne's personal use of a work vehicle.

[6] Mr Osborne, represented in this matter by his father Darrell Osborne, accepted liability for personal travel totalling 1,370.69 kilometres. He proposed paying a rate of 24 cents for those kilometres, that is \$274.13, along with \$20.90 for tolls incurred on that travel.

The Authority's investigation

[7] The prospect of resolution was discussed with the parties during a case management conference about Caleys application. Settlement was not achieved so an investigation meeting was scheduled. Mr Pepper, Mr Osborne and Mr Osborne senior each gave affirmed oral evidence at the investigation meeting. This included discussion of the analysis and calculations each party had made of the vehicle's GPS records, an appropriate rate to pay for personal use and whether Caleys had or could incur any liability for FBT for the additional use Mr Osborne had made of the van.

[8] 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 submissions received.

The issues

[9] Matters for inquiry and determination included:

- (a) How much of Mr Osborne's use of the vehicle fell within the terms permitted for its use?
- (b) What was an appropriate rate for him to pay for personal use?
- (c) What toll charges should be paid for?
- (d) Was Mr Osborne liable to reimburse Caley's for potential FBT liability?
- (e) What orders for payment by Mr Osborne to Caley's should be made?
- (f) Should any order for costs and expenses be made?

The extent of personal use of the work vehicle

[10] The parties agreed Mr Osborne had checked with Mr Pepper about whether the policy allowed him to call by the supermarket and a building supplies store while travelling home in the work van. Mr Pepper confirmed he had said Mr Osborne could stop by a building supplies store, which was in the same street as Caley's factory, and at the supermarket as long as this was on Mr Osborne's way home.

[11] While Mr Osborne accepted he should pay Caley's for personal use he had made of the van, on days off and after work, he disputed how much he should be required to pay for travel after he moved house in May 2019. At that time Mr Pepper did not know Mr Osborne had moved from a residence in a Tauranga suburb, about six kilometres distance from the Caley's factory, to another residence about 18 kilometres south of that location.

[12] In order to comply with FBT exemption requirements Caley's got its employees who were provided with a vehicle to sign a letter confirming they had the use of that vehicle to "take home each day and ... to be used for Caley's business only". Mr Osborne signed this form letter on 28 May 2019. It listed his home address as in a street in the Tauranga suburb of Hairini. Around a month later Mr Pepper found out Mr Osborne had moved to an address in Omanawa, a rural district south of the city. On 28 June Mr Pepper got Mr Osborne to sign an updated letter listing his new address. The letter had the same wording about taking the vehicle "home each day" and using it

only for Caleys business. A handwritten note on the letter, initialled by Mr Osborne, said the change of home address was “effective from 14 June 2019”.

[13] The subsequent discrepancy between the tallies that Caleys and Mr Osborne made of the extent of his personal use of the van could largely be explained by two differences in how they analysed the travel recorded on Caleys’ GPS records.

[14] Firstly, Mr Pepper’s analysis did not accept that Mr Osborne’s travel to the Omanawa address could be counted as approved work travel until after the change of home address had been notified to the company. In some instances, where Mr Osborne had first travelled to the Hairini address after work and then on to the Omanawa address some time later, Mr Pepper counted only the shorter 6 km leg of that journey to Hairini as approved travel. He discounted the later and longer 18 km drive to the Omanawa address as being permitted work to home travel.

[15] By contrast, calculations prepared by Mr Osborne senior included the distance from the Omanawa address as approved work travel from the time his son moved there in May, not only from June when Caleys learnt of that change.

[16] Secondly, Mr Osborne’s calculation of permitted detours on his way home from work were more generous than the scope envisaged by the company’s policy. For example, regular visits to a supermarket in the suburb of Bethlehem were not on a direct route to his home address, whether at Hairini or at Omanawa.

How much personal use was beyond the permitted level?

[17] While Mr Osborne accepted his personal use of the van went beyond what was agreed in the company policy and orally with Mr Pepper, his concession of around 1300 kilometres being driven for non-work purposes still fell short of what the GPS records showed.

[18] The instances where he had driven to Hairini, then back across the central city to a supermarket at Bethlehem and then south to Omanawa were clearly outside reasonable use for travel to and from home for work. The fact Mr Osborne wanted to spend time at two residences, while he was completing renovations and moving between properties, was not an expense his employer had agreed to pick up in providing him with a van. He had his own personal vehicle but had put it in storage during some of this period because he had the use of the work van. Neither was Caleys reasonably

liable to cover the costs of other instances of weekend and after hours use or an instance where Mr Osborne was driving the van while on sick leave.

[19] The extent of Mr Osborne's personal use of the vehicle was, however, also an issue Caleys could have identified and prudently addressed earlier given the availability of GPS records for its work vehicles. And, at least by June, there was a reason to more closely check Mr Osborne's use of the vehicle on the records available to the company. This reason was his failure to advise the company of his change of home address which significantly increased the distance and cost of use for travel to and from work.

[20] But, as agreed with the parties at the investigation meeting, it was impractical for the Authority to exhaustively analyse the reason and validity of every trip identified in the GPS records over many weeks in 2019, given the passage of time and the reality that what was said about each one could not reliably be checked.

[21] In that context only a broad assessment of the extent to which Mr Osborne had gone beyond the permitted use was possible. I have considered the detailed discussion during the investigation meeting with Mr Osborne and Mr Pepper about a number of instances in their respective analyses of the information and concluded a figure of 1,900 excess kilometres was an appropriate estimate of the extent of personal use beyond the agreed terms for use of the van.

What amount is due for that use?

[22] Mr Pepper advocated using "the IRD rate" of 79 cents a kilometre as the appropriate figure to charge for each surplus kilometre. He said that was appropriate because that rate was widely accepted as what an employer would pay an employee when the employee used their personal vehicle for work purposes.

[23] Mr Osborne senior submitted that the IRD rate was not appropriate for an employer to charge an employee because it includes elements such as allowing for depreciation of the vehicle, which was (in part at least) a factor that would apply regardless of the employee's use of the vehicle. A similar argument applied to other fixed costs such as insurance and registration fees.

[24] An alternative lower rate of 24 cents proposed by Mr Osborne senior did not, however, have sufficient supporting information about why it might be a reasonable rate. Instead, an appropriate balance in the particular circumstances of this case seemed

to be struck by a rate of 63 cents a kilometre referred to in Mr Osborne's statement in reply. It came from an online commercial tool used to calculate the cost of running a van similar to the one Caley's provided Mr Osborne. It more fairly allowed for elements of variable or flexible costs, including wear and tear, associated with Mr Osborne using the vehicle.

[25] Applying that rate of 63 cents to the 1,900 kilometres assessed as in excess of the permitted work use, the amount Mr Osborne was liable to pay is \$1,197.00.

[26] In his oral evidence Mr Osborne confirmed he was in full-time work and there was no reason he could not pay an order reimbursing Caley's for his personal travel.

Mr Osborne's liability for toll charges

[27] Mr Osborne agreed he was liable for tolls of \$20.90 incurred while travelling on toll roads around Tauranga for personal purposes.

[28] The tolls Mr Osborne incurred in the vehicle were higher once he moved to Omanawa as the route he took to work was on a tolled road.

[29] Caley's said he owed \$58.90 for those additional tolls because the company had a policy that toll roads could only be used for business trips, not when using the work vehicle to travel to and from home. However, that limitation was not set out in the letters Mr Osborne signed in March and June or referred to in his written employment agreement.

[30] The amount Mr Osborne must pay for toll charges is the \$20.90 for which he accepted liability.

No amount due for purported FBT liability

[31] Caley sought an order for Mr Osborne to pay money it said it could have to pay for FBT liability on his personal use of the van. However, as this matter was in dispute, Caley had not included this travel in its returns to IRD and no information from IRD was consequently available confirming any additional amount was actually due.

[32] As discussed at the investigation meeting there were a number of reasons to doubt liability would arise. Firstly, the orders made for payment by Mr Osborne to Caley's for additional unauthorised personal use of the vehicle meant he had not

obtained any untaxed benefit. Secondly, Caleys evidence showed it made reasonable efforts to ensure employees were adequately advised about the limits of the use of the vehicle so the company would not incur liability for FBT. There was nothing to suggest Caleys had turned a blind eye to Mr Osborne breaching its policy. Thirdly, there was no expert accounting or tax advice properly in evidence to conclusively resolve this point in Caleys favour. Rather Mr Pepper and Mr Osborne senior each offered some second hand and differing views of their understanding of the situation, based on what they said were discussions with various accountants. All in all, this was not enough to warrant making the order Caleys sought on that aspect of its application to the Authority.

Costs and expenses

[33] Mr Pepper represented the company throughout so there is no order for any costs of legal representation. Mr Osborne must however reimburse Caleys for the \$71.56 fee paid to lodge its application to the Authority.

Summary and orders

[34] For breaching the terms on which he was provided a vehicle for work use, Mr Osborne must reimburse Caleys the sum of \$1,217.90 for additional kilometres travelled for personal use and for tolls incurred in that travel. He must also reimburse Caleys \$71.56 for the Authority fee. The total sum owed is \$1,289.46. Mr Osborne must pay that sum to Caleys within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority