

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 2A/09
5139826

BETWEEN DECOM LIMITED
 Applicant

AND TANE FRANCIS CLEAVER
 Respondent

Member of Authority: Philip Cheyne

Representatives: Janet Copeland, Counsel for Applicant
 No appearance for the Respondent

Investigation Meeting 20 March 2009 at Invercargill

Determination: 24 March 2009

DETERMINATION OF THE AUTHORITY

[1] This is a second and final determination concerning an employment relationship problem between Decom Limited and one of its former employees, Tane Cleaver. Decom Limited says that Mr Cleaver breached express and/or implied terms of his employment by failing to return all the tools issued to him during his employment when it ended on 28 February 2008. To remedy this Decom Limited claims penalties, damages, a compliance order, interest and costs. Mr Cleaver says that he has returned all the tools he was responsible for.

[2] While Mr Cleaver did not attend the investigation meeting he did participate to a limited extent because I phoned him in Australia where he now lives and works, asked him a number of questions and gave him an opportunity to say anything else by way of explanation. I note that Mr Cleaver has provided a statement in reply, sworn statement made by him in Australia and I have an unsworn statement and other material provided by Mr Cleaver's friend. I should also note that Mr Cleaver was served with the statement of problem and the notice of meeting.

[3] There are disputes about whether Mr Cleaver returned all of Decom's tools and whether all the tools supplied in his name were his responsibility. I will deal with those issues once I have determined what were Mr Cleaver's obligations regarding the tools supplied to him.

Terms of employment

[4] Mr Cleaver accepts that he was given a proposed employment agreement before he was employed and told that he was entitled to get independent advice. He started work some weeks later on 13 December 2002 and was given a further copy of the employment agreement at that time. The agreement provides for the parties to sign it but Mr Cleaver never did. However Mr Cleaver must be taken as having agreed to the written terms of employment because there was no protest about them at the time and he accepted all the benefits provided by the agreement. In the earlier determination on this problem I noted the difficulty for Decom Limited in arguing that Mr Cleaver was bound by subsequent contractual documents that were at least partly disputed. At that time the only written document provided to the Authority was a 2007 version of a proposed employment agreement. However, I accept that from the commencement of the employment Mr Cleaver was bound by the following terms as expressed in the 2002 document:

- 12.1 *The employee will be issued with the protective clothing and equipment necessary to satisfactorily and safely complete his/her duties.*
- 12.2 *All items issued to the employee by the employer shall remain the property of the employer and shall be replaced by the employer on the basis of fair wear and tear.*
- 12.3 *Upon termination of the employee's employment the employee shall return all items of clothing and equipment issued to him/her to the employer. Where any item is not returned the employer shall make a deduction from the employee's final pay for the replacement cost of any unreturned items.*

[5] If any of the subsequent written documents in the form of employment agreements became binding that would make no difference to the resolution of this problem because all those documents included the same obligation for Mr Cleaver to return his employer's property at the end of the employment. Because of this finding about an applicable express term of the employment it is not necessary to deal with

Decom Limited's other submissions about the source of Mr Cleaver's obligation to return or account for tools.

Supply of tools and their return

[6] Peter Leith is a director of Decom Limited. I accept Mr Leith's evidence that he showed Mr Cleaver the process for obtaining tools on Decom's account from local suppliers on Mr Cleaver's first day of work. Mr Leith took Mr Cleaver to a shop and he ordered some tools on Decom's account by providing his name as the order number and signing the invoice. The invoice was sent to Decom Limited and the tools were supplied to Mr Leith who gave them to Mr Cleaver. From then on Mr Cleaver often obtained tools on Decom's account for use in his work for Decom by giving the supplier his name as the order number and signing the invoice.

[7] Mr Cleaver says that some of the invoices in his name were for tools he then supplied to other workers. Earlier in the course of this dispute he identified Jason Nicolson as one such worker. Mr Nicolson gave evidence that he was never supplied with any tools ordered in Mr Cleaver's name; that he has never ordered tools in his name to supply to anyone else; and that no-one else has ordered tools in their name to supply to him. Mr Nicholson explained the process for ordering tools as described above by Mr Leith. I accept Mr Nicolson's evidence. Mr Leith gave evidence which I also accept that the only variations to the process in practice are that sometimes another worker picks up tools for the person who has ordered them and sometimes the tools are ordered and taken without the worker signing the invoice despite the supplier knowing that the invoice should be signed. Assessing the evidence overall, I do not accept that any of the invoices in Mr Cleaver's name were for tools that he supplied to other workers.

[8] Mr Cleaver said during our phone call that he has returned all Decom Limited's tools. However he certainly has not returned all the tools that he bought on Decom Limited's account for his use during the employment, as established by the invoices provided by Decom. I must determine whether there is any legitimate excuse for Mr Cleaver's failure to return all the issued tools.

Mr Cleaver's assertions

[9] Mr Cleaver says that tools purchased in late 2002 and 2003 were more than likely worn out, damaged or lost. Decom Limited replaces any such tools at its own

expense if the worker reports that to Mr Leith. I accept Mr Leith's evidence that Mr Cleaver never reported wear, loss or damage in respect of any tools issued to or taken by him. Mr Cleaver's general assertion about tools being worn out, lost or damaged makes no difference to his liability at this point.

[10] Mr Cleaver says that some of the tools ordered by him went into the vans for general use by all staff. Mr Leith tells me that they have checked the vans for any of the tools specifically identified by Mr Cleaver in this category but have not located any of those tools. I do not accept Mr Cleaver's assertion that any of the tools purchased by him on Decom Limited's account went into the vans so as to absolve him of responsibility.

[11] Mr Cleaver says that some of the tools he bought on Decom's account were to replace his own tools that were damaged while they were being used by him on Decom's business. Mr Nicholson told me that he sometimes uses his own tools which if lost or damaged are replaced by Decom after he has sought Mr Leith's approval. Mr Leith confirmed this as the appropriate way to deal with the situation. Mr Leith told me that Mr Cleaver never once mentioned during the employment about losing or damaging his own tools. I accept this evidence from Mr Nicholson and Mr Leith. I do not accept at this point that any of the tools purchased by Mr Cleaver on Decom's account were to replace his own tools.

[12] Some of the tools returned by Mr Cleaver do not match the description on the invoice that shows what was purchased. For example I was shown a set square which because of its dilapidated state could not possibly be the set square described in the invoice. The returned item is not properly useable. Similarly I was shown a basic hack saw which is quite different from the high quality one described in the invoice. Return of these inferior substitute tools by Mr Cleaver does not satisfy his contractual obligation.

[13] Two other points are raised on Mr Cleaver's behalf. First it is said that Decom's claim does not take account of depreciation. Depreciation is not relevant since the tools were all treated as expenses and their value has not been written down over time. I note also that Decom's claim is at original cost (excluding GST) rather than replacement cost so is likely to be lower than could be claimed under the employment agreement. The second point concerns insurance. Mr Leith told me and

I accept that Decom's insurance policy does not cover the situation where an employee fails to return tools in breach of their employment agreement.

Breach of agreement and quantification of loss

[14] I am satisfied that Mr Cleaver has breached clause 12.3 of his employment agreement by failing to return all the equipment and clothing issued to him during the employment.

[15] At the investigation meeting Decom Limited established that the purchase price of the tools that have not been returned amounts to \$2,894.50. That sum reflects the loss suffered by Decom Limited as a result of Mr Cleaver's breach of his employment agreement. I therefore order Mr Cleaver to pay Decom Limited damages in the sum of \$2,894.50.

[16] Counsel accepted that a compliance order is now of little assistance so nothing more needs to be said about that.

[17] There is a claim for a penalty for a serious and sustained breach of good faith by Mr Cleaver. As put forward that relates to Mr Cleaver's prevarication in responding to the problem, all conduct that post dates the end of the employment relationship. For that reason the penalty claim for breach of good faith cannot succeed.

[18] There is also a claim for a penalty for breach of the term in the employment agreement requiring tools to be returned. I accept that such a breach is established to the requisite standard. Mr Cleaver's prevarication in his dealings with Decom Limited is relevant to assessing whether a penalty should be imposed and the level of any penalty. In April 2008 Mr Cleaver claimed not to have any more of Decom's tools but by July 2008 he sought and obtained an adjournment of Disputes Tribunal proceedings to allow him to return tools and/or arrange to make payment to Decom Limited. Neither happened. In December 2008 Mr Cleaver told the Authority that he still had some tools which he returned soon after. Later in December and after he had returned only a few items it emerged that he was leaving New Zealand. It is difficult to escape the conclusion that Mr Cleaver was trying to put off things until after his departure. The breach itself is of some significance since there is an element of trust involved. All this leads me to the conclusion that a penalty of \$750.00 should be imposed on Mr Cleaver.

[19] I am asked to make an order that any penalty recovered should be paid to Decom Limited. Decom is not able to recover anything for the inconvenience caused by this matter. If the penalty is to be paid to Decom Limited rather than the Crown it is also more likely to actually be collected. For those reasons I will make the order sought.

Summary

[20] Mr Cleaver breached his employment agreement by failing to return to Decom Limited all the tools supplied to him during his employment. To remedy that breach he must pay Decom Limited damages in the sum of \$2,894.50.

[21] Mr Cleaver is to pay interest on \$2,894.50 to Decom Limited at the rate of 5% per annum commencing on 28 February 2008 until the damages sum is paid in full. This interest rate is lower than that claimed but the Authority's power to award interest is not unlimited: see clause 11 of the 2nd schedule to the Employment Relations Act 2000.

[22] I impose a penalty of \$750.00 on Mr Cleaver for breach of his employment agreement, the whole of which is to be paid to Decom Limited.

[23] There is a claim for costs which Mr Leith quantifies in his second affidavit as \$2,500.00 for a one day investigation meeting. The meeting took less than a half a day. The uncertainty about the contractual situation given Mr Cleaver's failure to sign his employment agreement, the large number of tools to be traced, Mr Cleaver's conduct in drip feeding their return and his various assertions (mentioned above) added some complexity to this problem. That entitles Decom Limited to an award of more than would be typical for a half day meeting. I fix that sum at \$2,000.00. Mr Cleaver is to pay Decom Limited costs of \$2,000.00 plus \$70.00 for the lodgement fee.

Philip Cheyne
Member of the Employment Relations Authority