

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 485
3150728

BETWEEN GUBB DESIGN LIMITED
 Applicant

AND MATT BIDDLE
 Respondent

Member of Authority: Peter Fuiava

Representatives: Ashley Sharp, counsel for the Applicant
 Respondent in person.

Investigation Meeting: On the papers

Submissions received: 10 September and 12 October 2021 from Applicant

Determination: 1 November 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application for compliance brought by Gubb Design Ltd (GDL), a small architectural firm in West Auckland, against Matt Biddle, a now former architectural designer and technician of the firm. GDL wishes to get back from Mr Biddle its work documents and files which despite repeated requests and multiple opportunities, he has not returned.

Relevant Facts

[2] Mr Biddle commenced employment with GDL on 13 May 2021. His individual employment agreement (signed 11 May 2021) required him to work a minimum of 40 hours per week. He was paid a salary of \$85,000 per annum which was subject to a review after the first three months of employment.

[3] On 17 August 2021, Darren Gubb, a director and majority shareholder of GDL, anticipated that New Zealand would be placed into COVID-19 Alert Level 4. He therefore instructed his staff, including Mr Biddle, to take home with them the projects they had in order to continue to work from home during the lockdown.

Difficulty in contacting Mr Biddle

[4] During the first week of the lockdown (18 to 25 August 2021) Mr Biddle did not keep in contact with either Mr Gubb or Carolyn Ferrall, GDL's operations and administration manager. In order to check that everything was alright, Ms Ferrall emailed him on 25 August 2021.

[5] Mr Biddle replied by email shortly afterwards stating that he had had a "crazy couple of days" in that he had been required to self-isolate due to a close friend (who was part of his bubble) visiting a place of interest and who was waiting for the outcome of his COVID-19 test. Mr Biddle further stated that he had been having issues with his internet and email and that he was not able to get a new router while he was self-isolating. He had also knocked his mobile phone into a sink of water which had recently started to work.

[6] Mr Gubb emailed on the morning of 26 August 2021 inquiring Mr Biddle about the outcome of his friend's COVID-19 test and whether he could email the project work he had been doing by tethering his phone to his computer. If that was not possible, Mr Gubb asked whether he could visit the office so that his work could be sent out.

Attempt to deliver work by USB stick

[7] Mr Biddle responded by email some two hours later advising that there was still no news regarding his friend's test result and that he was not able to tether his phone to his computer. Mr Biddle wondered whether it was possible for him to pick up a spare router from the office. Mr Gubb responded shortly afterwards by email suggesting that it might be quicker if he left a USB stick that contained his work at the office and collected a spare router while he was there.

[8] In a subsequent email, Mr Biddle advised that he was sure that he had his own USB stick that he could use. Arrangements were then made for a contactless exchange at the office where a co-worker would be onsite with a router for Mr Biddle to collect.

[9] At 5.04 pm, 26 August 2021, Ms Ferrall emailed Mr Biddle that she had been informed by the co-worker that when he arrived at the office, he did not have a USB stick with him. Consequently, he was given a USB stick and a spare router. Mr Gubb later emailed Mr Biddle to ascertain whether he was loading his project work onto the USB stick and whether it was possible for him to collect it from his home as a matter of urgency.

[10] On the morning of 27 August 2021, Mr Biddle emailed that he would deliver the USB stick to the office at approximately 10.30 am that morning. At 12.32 pm, Ms Ferrall emailed Mr Biddle to see where he was because he had not attended the office at the time he had arranged. Because his work was urgently required, she suggested that either she or Mr Gubb collect the USB stick from his home at 2 pm that afternoon by way of contactless exchange. Mr Gubb emailed Mr Biddle also impressing upon him the importance of getting the USB information as soon as possible. He had been expected at the office at 10.30 am that morning but there had been “zero communication” from him since then.

[11] Ms Ferrall later emailed Mr Biddle at 2.26 pm that same afternoon stating that she had been trying to contact him several times during the day but had not heard from him. She and Mr Gubb were now very concerned. If she did not hear back from him by 4.30 pm, she was going to contact his next-of-kin person who was his sister.

[12] Shortly afterwards, Mr Biddle emailed Ms Ferrall stating he was sorry for his non-attendance that morning which was due to his going out with a friend to celebrate his 50th birthday and not having his mobile phone with him. Mr Biddle stated that he was now making his way to the office with the USB stick.

USB stick either encrypted or contained no information

[13] When Mr Gubb arrived at the office to collect the USB stick, he discovered that it had no information on it. He immediately emailed Mr Biddle asking him whether he

could come back with his laptop so that he could use the office Wi-Fi to upload his work onto the server.

[14] Mr Gubb emailed Mr Biddle shortly afterwards to advise him that an IT service consultant had looked at the USB stick and was of the opinion that it was either encrypted or had no information on it. Mr Gubb repeated his request that he return to the office with his laptop and that he also bring with him a pair of gloves and a mask. As a precaution, Mr Gubb had taken the step of cleaning down all the door handles and around his desk. He apologised for asking this of him on his birthday but he had been trying to get the files from him for several days and the clients were now “at their wits ends with us”. Mr Biddle did not return to the office.

[15] On 30 August 2021, Mr Gubb emailed Mr Biddle three times during the course of the day requesting him to provide something that he could send to the clients. Calls to his phone had gone unanswered. In his third email, Mr Gubb stated the following:

Hi Matt

You are continuing to ignore my emails, and you have not delivered the work as discussed.

I am now requiring you to make contact with me to arrange the delivery of the files today (in whatever form they are currently in – finished or not).

It is my expectation that the files are delivered no later than 4.30pm today. I am happy to come to your house to collect the files from a USB stick (contactless). The stick you gave me had no information on it or it was encrypted. You can come into the office with your laptop (the Wi-Fi should reach your vehicle from the road outside). I will ensure that level 4 guidelines are adhered to. Please confirm to me as soon as possible your preference.

Matt, I am very concerned about your continued lack of communication with me and your refusal this far to deliver the work as agreed.

You need to be aware that if you refuse to follow this direct instruction, and if you fail to contact me and/or deliver the files, then I will treat this matter formally and disciplinary action is a possible outcome.

First formal letter to Mr Biddle

[16] The above email was followed by a formal letter (1 September 2021) from Mr Gubb which recorded that Mr Biddle had been absent from work and uncontactable for sporadic periods of time since Wednesday 18 August 2021, and consistently since Friday 27 August 2021. GDL had attempted to arrange the delivery of two urgent pieces of work from him, but despite his assurances, he had failed to deliver the work.

There was no evidence that he been working and he had not communicated to say otherwise. Numerous attempts had been made to reach him via email, text message, WhatsApp and telephone calls. Mr Biddle was advised that if he did not make contact to discuss his absence by 5pm, Friday 3 September 2021, Mr Gubb would have no alternative but to conclude that he had abandoned his employment.

Informal time sheet provided

[17] By email of 2 September 2021, Mr Biddle expressed his disappointment in receiving Mr Gubb's letter particularly as he had known since 20 August 2021 of his internet connection issues which prevented him from accessing his work emails and uploading files. Mr Biddle stated that he had just received a replacement phone and was in the process of transferring data from his old phone. Further, he was waiting for a replacement router from his internet service provider as the router he collected from the office did not resolve his internet/Wi-Fi issues. Finally, Mr Biddle stated that he would continue to work for GDL. He provided Mr Gubb with a time sheet of his work hours over the previous two weeks.

[18] In his time sheet, Mr Biddle stated that he had worked from 19-21 August, 23-28 August, and 31 August 2021, and that he had worked a total of 82.45 hours during that period. The hours claimed included two hours for getting vaccinated against COVID-19 and six hours on trying to restore his internet connection. Mr Biddle advised that his salary had not changed after three months of continuous employment and he queried whether Mr Gubb would be assisting him with his home power usage.

[19] Mr Gubb responded by email later that same day. He referred Mr Biddle to his previous emails where he had been instructed to deliver his project work as a matter of urgency. The USB stick that Mr Biddle had provided earlier was either empty or encrypted. It was office policy for projects to be uploaded onto GDL's OneDrive server and as he had not done so, there was nothing to send to the clients. Mr Biddle could have driven to the office and used the office's Wi-Fi to upload his work while remaining in his vehicle. He was requested once more to go to the office to upload his work which had its surfaces, door knobs and pull handles cleaned down by Mr Gubb the day before.

[20] In response to Mr Biddle's request for a salary review, Mr Gubb accepted that his remuneration needed to be reviewed after three months but that could not be done

while Auckland remained at COVID-19 Alert Level 4. In any event, the outcome of any review was a matter for Mr Gubb in his sole discretion.

[21] Mr Biddle responded immediately to Mr Gubb's email confirming that communicating by email was best. He further stated that he was not able to attend the office that day (no reason was given as to why that was) and that it was his understanding that his salary would be increased after three months' employment. However, it now seemed this would depend on key performance indicators (KPIs) that had not been discussed. When the subject of his salary was first raised, Mr Biddle had in mind the figure of \$95,000 per annum.

Attempt to deliver external hard drive

[22] Mr Gubb responded to Mr Biddle's email that same afternoon (2 September 2021) stating that there was no evidence he had been working especially when he had not provided any work to support his informal timesheet. Although GDL was in the process of processing his mileage claim, Mr Gubb was withholding payment of Mr Biddle's wages for the last pay period (18 August 2021 to 1 September 2021) until he produced the work that he had claimed to have done. Mr Gubb stated further that he would, while observing social distancing and avoiding direct contact with Mr Biddle, deliver an external hard drive to his home address at 4.30 pm that afternoon. He would then wait outside for approximately 30 to 40 minutes to collect the hard drive after Mr Biddle had downloaded his work.

[23] Mr Gubb advised Mr Biddle that if he did not deliver his work to him that afternoon, he would consider this as a failure on his part to follow a direct, reasonable and lawful instruction. Mr Gubb confirmed that once he had received Mr Biddle's work that his pay would be processed immediately.

[24] Later that same afternoon at 4.23 pm and 4.32 pm, Mr Gubb emailed Mr Biddle of his arrival and that he was outside his apartment for a contactless drop-off of the hard drive. Mr Biddle did not respond but later stated that he had missed Mr Gubb's messages because he had gone out for a run.

[25] At 5.38 pm that same day (2 September 2021), Ms Ferrall emailed Mr Biddle to advise him that he would be receiving the COVID-19 wage subsidy as the company

was required to pay this to him. He was further advised that his mileage claim would be processed once he provided a copy of the claim. There was no response by Mr Biddle.

Second formal letter to Mr Biddle

[26] On 3 September 2021, Mr Gubb emailed a further letter to Mr Biddle which set out the chronology of events as described above. There was a dispute concerning Mr Biddle's entitlement to wages for the last pay period because he had not produced any information or work to support the timesheet he provided. Despite efforts to enable Mr Biddle to deliver his work, he had failed to follow Mr Gubb's direct instruction on two separate occasions and had repeatedly ignored his communications.

[27] Mr Gubb instructed Mr Biddle to deliver the work he had been doing by 5.30 pm, 3 September 2021. It was critical that Mr Gubb had access to that information which once received would result in Mr Biddle's wages being processed immediately. If he failed to comply, Mr Gubb advised that he would be seeking an urgent compliance order from the Authority.

[28] Mr Biddle responded to Mr Gubb's email that afternoon stating that he would not be supplying anything until his wages were paid. He considered Mr Gubb's actions inappropriate and that if his wages were not paid, he would be approaching the relevant authorities for redress.

Personal grievance raised

[29] By email of 5 September 2021, Mr Biddle raised a personal grievance with Mr Gubb regarding the non-payment of his wages and that his salary had not been increased because Mr Gubb had stated that his salary review was a matter in his sole discretion and that there had been no discussion about KPIs. However, Mr Biddle expressed a willingness to attend mediation or even a formal hearing.

[30] Mr Gubb emailed Mr Biddle on 6 September 2021 to acknowledge receipt of his personal grievance but provided no other response.

[31] Sometime during the week commencing Monday 6 September 2021, it was discovered that client information had been deleted from Mr Biddle's OneDrive account.

Zoom meeting between the parties

[32] Copies of two letters (16 and 18 September 2021) from Mr Gubb to Mr Biddle were provided to the Authority. The first letter makes reference to a Zoom meeting between the parties on 15 September 2021 and summarises Mr Biddle's reasons for failing to deliver his project work which included technological issues that had prevented him from keeping regular contact with Mr Gubb. Mr Biddle stated that he was not aware that the information on the USB stick he provided was unreadable. When asked why he had not delivered his work when he had been repeatedly asked to do so, Mr Biddle stated that no work would be provided until his wages were paid.

[33] In terms of the timesheet that was provided, Mr Biddle maintained that it was an accurate account of his hours of work. Mr Biddle questioned why he needed to provide evidence to support his timesheet when he had not been asked to do so before. Mr Gubb explained that there had not been the need until now because he had always been able to access Mr Biddle's work via the server. Mr Biddle further claimed that he had been suspended from employment since 31 August 2021, which Mr Gubb clarified was not the case.

[34] The letter further records Mr Biddle's denial that he had deleted any files from the OneDrive server. He suggested that someone else who knew his account password may have done so. However, Mr Gubb stated that this was unlikely as the only other person who had access to his account was Mr Gubb himself.

[35] The letter set out Mr Gubb's preliminary findings against Mr Biddle namely that he was absent from work from 18 August to 2 September 2021, failed to undertake the duties of his position, failed to follow his employer's direct instruction on three separate occasions to deliver his work, breached the terms of his employment agreement which required him (among other things) to undertake all reasonable and lawful instructions and directions from his employer, acted deceptively and dishonestly, irreparably damaged trust and confidence, jeopardised two current projects that could

result in significant financial losses for GDL, and caused reputational damage to the business.

[36] Mr Gubb considered that Mr Biddle's actions constituted serious misconduct and proposed that he be summarily dismissed from his employment. Before finalising his decision, Mr Gubb provided Mr Biddle with an opportunity to provide further submissions and invited him to attend another meeting by Zoom.

Mr Biddle summarily dismissed

[37] A copy of Mr Biddle's response was not provided to the Authority but Mr Gubb's second and final letter of 28 September 2021 recorded that he had disagreed with all of the preliminary findings noted above and suggested that by not paying his wages, it was Mr Gubb's actions that had potentially jeopardised projects and caused reputational damage to the business.

[38] Mr Gubb acknowledged that Mr Biddle's lack of communication with him was due to the technological issues he had experienced however several arrangements and numerous opportunities had been provided for him to deliver his work in a safe and secure manner. Two of Mr Biddle's eight projects were now well overdue and Mr Gubb had no choice but to start that work again which resulted in GDL's relationship with the affected clients to come under significant pressure.

[39] Mr Gubb confirmed his preliminary finding that Mr Biddle be summarily dismissed, effective immediately. He was required to return his keys and all other company property in his possession by 5 pm 28 September 2021. Mr Biddle was further advised that his final pay would be processed which would include any holiday pay that was owing to him.

[40] On 12 October 2021, Mr Gubb and Mr Biddle attended mediation but the parties were not able to reach a resolution.

The Authority's investigation

[41] On 10 September 2021, GDL filed its statement of problem, notice of application for compliance, affidavit in support from Mr Gubb and memorandum from counsel with the Authority. Mr Biddle did not initially acknowledge the Authority's

email regarding service of the proceedings. This was not helped by the fact that, due to an administrative error, the proceedings had been sent to an incorrect email address on 14 September 2021.

[42] However, the error was rectified and the Authority emailed Mr Biddle with a copy of GDL's proceedings on 15 September 2021. With the assistance of the Authority's Wellington office, a hard copy of the proceedings were printed and couriered to Mr Biddle's home address in Auckland.

[43] To progress matters, arrangements were made for a case management conference during which time Mr Biddle emailed the Authority on 27 September 2021 that he was available. The teleconference took place on 28 September 2021 during which time Mr Biddle stated that he had not received the Authority's email of 15 September 2021 which included a copy of the above documents. I invited Mr Biddle to check his junk mail folder which he did. He later confirmed that he had received the email in question. By his own admission, Mr Biddle acknowledged service.

[44] Given the urgent need for GDL to have its work documents returned, I granted its application for compliance urgency pursuant to clause 17 schedule 2 of the Employment Relations Act 2000 (the Act). Its substantive claims against Mr Biddle for penalties for breach of good faith and breach of the employment agreement will be dealt with in due course.

[45] During the case management conference, I directed Mr Biddle to file his written submissions in response to GDL's application for compliance by 4 pm Friday 8 October 2021. Mr Sharp was directed to file his submissions in reply (only if required) by 4 pm Wednesday 13 October 2021. I advised the parties that I was minded to determine the application 'on the papers'. There was no objection to that course of action.

[46] Mr Biddle stated that he needed more time to respond and to get legal advice. I brought to his attention that if he needed more time to respond, he could apply to the Authority for an extension of time which would be considered together with any further comment from Mr Sharp.

[47] When no submissions from Mr Biddle were provided by the due date, the Authority emailed him on the morning of 11 October 2021 and gave him until 4 pm that afternoon to file his submissions, if any.

[48] On the morning of 12 October 2021, Mr Biddle emailed the Authority to advise that he had not received a copy of my minute of 28 October 2021. He advised that since the case management conference, he had received a date for mediation (12 October 2021) which he was going to attend and which he considered superseded everything else.

[49] The Authority checked that its minute had been emailed to the correct email address for Mr Biddle, which was the case. Out of an abundance of caution, I gave him until 4 pm Thursday 14 October 2021 to file his submissions but none have been filed and no statement in reply has been filed by Mr Biddle either.

Discussion

[50] Section 161(1)(n) of the Act gives the Authority exclusive jurisdiction to make compliance orders under section 137. Pursuant to section 137, the Authority has the power to order compliance with statutory provisions, the terms of employment agreements, orders, determinations, directions and requirements issued under the Act by the Authority.

[51] In the present case, the Authority has been asked to order Mr Biddle to comply with the terms of his individual employment which he and Mr Gubb both signed on 11 May 2021.

[52] Mr Biddle says that he has experienced technological issues with his internet and Wi-Fi which has prevented him from keeping in contact with Mr Gubb and uploading his work onto GDL's OneDrive server. There was also the impact of Auckland being at COVID-19 Alert Level 4 which has added to Mr Biddle's stress.

[53] While I have not been able to question Mr Biddle about his experiences, I acknowledge the difficulties and challenges that arise from working from home during a public health crisis. It can be a lonely existence. That being said, the email correspondence before me indicates that Mr Gubb and Ms Ferrall were well aware of

these challenges and they suggested innovative ways for Mr Biddle to deliver his work as safely as possible within the constraints of Alert Level 4.

[54] This included the contactless exchange of a USB stick, and when that failed, an external hard drive. When the delivery of that too failed, Mr Biddle had the option of driving to GDL's work office where he could have uploaded his work onto the server using the office Wi-Fi. This was something that he could have done from the safety of his own vehicle. Had he gone into the building, Mr Biddle would have found its surfaces, door knobs, pull handles and the area around his work station cleaned down by Mr Gubb personally.

[55] I note that clause 13 of Mr Biddle's employment agreement required him to complete a timesheet each day and that these needed to be accurate if they were to be processed in time. While Mr Biddle had questioned why he needed to provide proof of his work hours, a plain reading of clause 13 indicates that, in order to assess accuracy, that something was required for verification. The best evidence would have been the actual work itself.

[56] While Mr Biddle has not provided me with any written submissions opposing GDL's application for compliance, it is clear from the email correspondence provided that he attributes the non-delivery of his work to the non-payment of his wages for the pay period from 18 August to 1 September 2021.

[57] The non-payment of Mr Biddle's wages at the relevant time is one of the issues that I will explore at the investigation meeting because section 4 of the Wages Protection Act 1983 states that, subject to a lawful deduction or an overpayment of wages, when a worker's wages become payable, the entire amount must be paid without deduction.

[58] While Mr Gubb did not pay Mr Biddle's wages for the relevant period when payment for those wages fell due, there has been a material change circumstances since GDL's application for compliance was filed with the Authority. Since then, Mr Biddle has been dismissed from employment and Mr Gubb's letter of 28 September 2021 suggests *prima facie* that his wages and any holiday pay owing has now been paid. This determination does not attempt to explore whether Mr Biddle's dismissal could have

met the statutory test of justification at s 103A of the Act and there is nothing before me that suggests Mr Biddle is still owed wages.

[59] If I am wrong in this, in that Mr Biddle is owed wages, the fact that he has been dismissed from employment brings into effect clause 40 of his individual employment relationship agreement. Clause 40 states that, upon termination of the agreement for whatever reason, Mr Biddle is to immediately return to GDL all information, material or property (including but not limited to electronic data, storage devices, digital documentation, printouts, reports, letters, memos, plans, diagrams, security cards, keys, mobile phone and laptop computers) either belonging to or the responsibility of GDL and all copies of that material, which are in his possession or under his control.

[60] Clause 26 of Mr Biddle's employment agreement stipulates that all work produced, ideas, concepts, copyright, inventions, patents, trademarks or other processes developed or created by him for GDL under the agreement is the sole property of GDL. As such, any work that Mr Biddle may have done for his employer during the course of his employment is property that must also be returned to the company under clause 40.

[61] I note that when Mr Biddle signed his employment agreement on 11 May 2021, he acknowledged and declared that he had read and understood its terms and implications without question. He declared also that he had been advised of the right to seek independent legal advice and that he had been provided with a reasonable time and opportunity to seek that advice.

[62] I am satisfied that in signing his employment agreement, Mr Biddle had reached a consensus with his employer in that their minds were *ad idem*. I see no reason why the terms of this valid contract should not be enforced.

Proposed Orders

[63] At paragraph 3.2 of the statement of problem, GDL seeks a compliance order that is two-fold. First, that Mr Biddle be directed not to delete, damage, alter, or corrupt in any way GDL's documents in whatever form they may be. Second, that he be directed to declare in an affidavit the details of the files deleted from GDL's server.

[64] The first part is of no moment especially when s 137(2) of the Act allows for an order to be made that prevents a party or a witness from doing any specified thing or to cease any specified activity for the purpose of preventing further non-observance of or non-compliance with a provision, order, determination, direction, or requirement. However, I do take issue with requiring Mr Biddle to provide an affidavit as to the details of the files he is alleged to have deleted from GDL's server. Requiring him to provide such an affidavit would infringe the privilege against self-incrimination which is a fundamental principle of law.

[65] With some amendment to the orders proposed, I make the following orders:

- (i) No later than 4 pm Thursday 4 November 2021, Mr Biddle is to deliver to GDL all of its files including the work he has performed on them which are held on any computer or device in his possession, custody or control. This includes any soft files (electronic information) belonging to GDL stored on any laptop, personal computer or device that Mr Biddle has in possession, custody or control.
- (ii) So as to ensure that the manner of delivery is contactless as possible, Mr Biddle is to upload all soft or electronic copies of GDL's files, documents and projects in his possession to a folder in a file sharing application such as OneDrive, Dropbox and Google Drive. He is directed to email a link to that folder to Mr Gubb (darren@gubbdesign.co.nz) no later than 4 pm Thursday 4 November 2021.
- (iii) Mr Biddle is further directed to courier to GDL's office address any and all hardcopy files he has in possession, including the hardcopy file for C.W, together with the office modem, office keys, and any other property belonging to the company. Arrangements to have these items couriered to GDL are to be completed no later than 4 pm Thursday 4 November 2021. Mr Biddle is to email Mr Gubb no later than 4 pm Thursday 4 November 2021 that the courier arrangements have been made.

- (iv) Mr Biddle is ordered, effective immediately, not to delete, damage, alter or corrupt any of GDL's documents in whatever form they may be. This order remains extant and will not expire until further order by the Authority.

[66] I strongly impress upon Mr Biddle that his obligation to comply with the Authority's order is a strict one. If he were not to comply, GDL can apply to the Employment Court for the exercise of its powers of enforcement under s 140(6) of the Act. Those powers include imprisonment for up to three months and a fine not exceeding \$40,000.

[67] Costs are reserved. A further case management conference shall be organised in due course for the purpose of progressing this employment relationship problem to an investigation meeting.

Peter Fuiava
Member of the Employment Relations Authority