

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 335
3150728

BETWEEN GUBB DESIGN LIMITED
Applicant

AND MATT BIDDLE
Respondent

Member of Authority: Peter Fuiava

Representatives: Ashley Sharp, counsel for the applicant
No appearance by the respondent

Investigation Meeting: 8 April 2022

Further information and submissions received: At the investigation meeting and 19 April 2022 from the applicant

Determination: 19 July 2022

DETERMINATION OF THE AUTHORITY

- A. Matt Biddle to pay Gubb Design Limited no later than 4 pm Wednesday 17 August 2022 the following as remedies:**
- (i) \$98,525.80 in damages arising from Mr Biddle's breach of his individual employment agreement;**
 - (ii) a penalty of \$8,000 for breach of good faith half of which is to be paid to Gubb Design Limited and half to the Crown; and**
 - (iii) costs of \$6,750**

Employment Relationship Problem

[1] In my preliminary determination¹, I found that Matt Biddle had, despite repeated requests and multiple opportunities given by Gubb Design Limited (GDL), failed to return work files that either belonged to GDL or one of its clients. I made a number of

¹ *Gubb Design Limited v Matt Biddle* [2021] NZERA 485.

compliance orders against Mr Biddle which included the delivery to GDL of all files including the work he performed on them held on any computer or device in his possession, custody or control by 4 pm Thursday 4 November 2021. Mr Biddle has not complied with any of the Authority's orders. Among other matters, this determination resolves the extent to which GDL should be awarded damages as a result of Mr Biddle's actions.

The Authority's investigation

[2] For the Authority's investigation witness statements were lodged from Darren Gubb, the director of GDL, and Dave Allum, the director of Acronym, an IT company that GDL engaged to examine forensically Mr Biddle's OneDrive account.

[3] Apart from attending a case management conference on 28 September 2021 in which timetabling directions were made for the filing of submissions for the preliminary matter, Mr Biddle has not engaged with the substantive matter and, consequently, GDL's evidence has gone unchallenged. Mr Gubb and Mr Allum answered questions under oath or affirmation from the Authority and Mr Sharp, counsel for GDL.

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

The issues

[5] As set out in a minute from the Authority of 20 December 2021, the issues requiring investigation and determination were:

- (a) Did Mr Biddle breach good faith by not returning GDL's work documents and files when requested?
- (b) If Mr Biddle did not act in good faith, is he liable to pay for damages?
- (c) Should a penalty be imposed or other enforcement steps be undertaken against Mr Biddle for his non-compliance with the Authority's orders?

Breach of good faith established

[6] Mr Biddle was employed as an architectural designer for GDL. His employment agreement required him to work a minimum of 40 hours per week and for his role he was paid a salary of \$85,000 per annum.

[7] Clause 2.3 of Mr Biddle's individual employment agreement required him to "comply with all reasonable and lawful instructions" given by his employer. That requirement was buttressed by clause 10 which consisted of a list of obligations of what was expected of Mr Biddle as an employee. This included performing his duties with all reasonable skill and diligence and to the best interests of his employer and the employment relationship. Finally, clause 40 of the employment agreement required Mr Biddle to immediately return all property and material in his possession that belonged to GDL upon the termination of his employment.

[8] Mr Biddle was dismissed for serious misconduct on 16 September 2021. He has not returned his former employer's work documents and a hard copy file belonging to a client.

[9] By not returning files when requested by GDL, the Authority finds that Mr Biddle breached the requirement of good faith which lies at the heart of the employment relationship. As noted in the preliminary determination, Mr Gubb and Carolyn Ferral, GDL's operations and administration manager, suggested innovative ways for Mr Biddle to deliver his work as safely as possible within the constraints of COVID-19 Alert Level 4 that was in effect in Auckland from 17 August – 21 September 2021.

[10] Those methods included the contactless exchange of a USB stick and external hard drive and as an alternative having Mr Biddle drive to the office where he could upload his work from the safety of his own vehicle using the office Wi-Fi. However, despite alternative ways and means being offered, Mr Biddle has deliberately chosen not to return any of the work files he took home with him on the eve of the lockdown.

[11] Mr Biddle failed to return the physical files he had in his possession or control and neither did he upload any of his work onto GDL's server. Aggravating matters further, was his deletion of 3,202 items from his OneDrive account on 1 September 2021. This came two days after he had been advised by Mr Gubb on 30 August 2021

that, unless he uploaded or delivered his work by 4.30 pm that afternoon, he would escalate matters to a formal investigation.

[12] It was Mr Allum's evidence that in order to do so, a two-step process was required. Step one involved Mr Biddle deleting files from his local device so that the information could not be synchronised with the server. Step two involved Mr Biddle logging onto the cloud-based portal and deleting for a second time, those same files he had deleted earlier which had gone into his recycle bin.

[13] The Authority finds that Mr Biddle's actions in deleting electronic files from his OneDrive account to be neither accidental nor negligent but a conscious and deliberate decision on his part to cause loss to his employer for which GDL is entitled remedies.

Quantification of damages

[14] GDL seeks the following by way of remedies against Mr Biddle:

- (i) Losses of \$101,123.40 comprising \$60,700.97 in what the firm could have made had staff not been diverted away from doing other revenue-generating work, and \$40,422.43 in what it cost the firm for staff to redo Mr Biddle's work because he had not returned the files as requested;
- (ii) lost revenue of \$80,000 from four projects (\$20,000 each) which the firm was not able to undertake while it was reconstructing Mr Biddle's work (if any);
- (iii) lost revenue of \$150,000 from a project connected to a well-established residential construction company;
- (iv) loss of a chance to earn \$450,000 from the same construction company to do two other projects;
- (v) loss of a chance to earn \$267,975 from a large housing provider;
- (vi) penalty for breach of good faith; and
- (vii) \$18,745 being the cost to GDL in obtaining human resources advice and guidance concerning Mr Biddle.

[15] Awarding damages for loss of expected earnings is not a science. It is a matter of good sense for the Authority to evaluate as best it can the value of a lost opportunity.

As a matter of basic principle, GDL must prove that its losses were connected to Mr Biddle's actions and that his breach caused or materially contributed to its loss. While it is not necessary for the breach to be the sole cause of loss, it must be sufficiently linked to the breach to merit recovery in all the circumstances.²

[16] It was reasonably foreseeable and within the contemplation of the parties that if Mr Biddle failed to return the requested work files that this would harm GDL. For Mr Gubb, this meant having someone else in his staff redo Mr Biddle's work which would divert that staff member from doing other income-generating work for the practice. This division of labour was a necessary mitigation of loss so as to avoid the client going elsewhere for their work to be done.

[17] However, not all of the losses claimed by GDL are recoverable. This includes the lost revenue of \$80,000 from four projects. While Mr Gubb claimed that the average fee to the business would have been \$20,000 for each project, no supporting information or evidence was provided to substantiate such a margin and insufficient details concerning the prospective jobs were provided. Based on the paucity of information before the Authority, the loss quantification exercise cannot be advanced fairly and reasonably.

[18] The claim for the loss of a chance for GDL to earn \$150,000 from a large residential construction company as well as a further \$450,000 for two other projects have not been established either. It is noted that GDL has previously not done any work for the construction company and as such I find there was no reasonable expectation or entitlement that Mr Gubb's business could expect ongoing or regular work from the construction company when the business relationship was nascent and not well-established. An award of damages is too speculative in my view.

[19] Similarly, I regard the loss of a chance of GDL to earn a further \$267,975 from a state house building project to be speculative as well. Although I was referred to an email (8 July 2021) from a prospective client stating that the job could "start now and be done asap" I do not consider this to be the best evidence of a "done deal". It is noted that a subsequent email (21 September 2021) from Mr Gubb to the prospective client

² *Attorney-General v Gilbert* 1 ERNZ 31 at [96].

shows that GDL was still in the process of bidding for the project which demonstrates that other factors may have been in play in GDL losing that tendering process.

[20] The costs associated with GDL obtaining human resources advice in dealing with Mr Biddle is a cost that should be borne by the business. While it is acknowledged that GDL was put to added cost in dealing with a non-responsive and difficult employee, the business nevertheless benefitted from that advice particularly with respect to putting into place a formal and robust disciplinary investigation for Mr Biddle.

[21] Finally, there is GDL's claim for damages in the total amount of \$101,123.40. Of this amount \$5,195.21 relates to lost income as a result of Mr Gubb having to personally attend to matters arising from Mr Biddle's actions which diverted his ability to do other more profitable work. However, GDL is obligated to mitigate its losses and its operations and administration manager could have taken on some of that work which would have freed Mr Gubb to continue to generate income for the practice.

[22] I therefore reduce the above component by approximately one half so that the total amount of damages becomes \$98,525.80. In my view, this accurately reflects the loss suffered by GDL arising directly from Mr Biddle's failure to comply with a lawful and reasonable instruction to return work and client files. The claims relating to loss of a chance which are in the hundreds of thousands of dollars have a punitive aspect to them which I do not consider appropriate.

Penalty for breach of good faith

[23] As for the penalty sought against Mr Biddle for breach of good faith, in assessing quantum, I have considered the relevant factors set out at s 133A of the Act and looked at the range of penalties awarded in similar cases. As noted above, Mr Biddle's actions in deleting items from his OneDrive account and his failure to return work and client files when requested were deliberate and conscious decisions on his part that resulted in financial loss and reputational damage for GDL.

[24] The maximum penalty available against an individual is \$10,000 per breach. Arguably two penalties (breach of employment agreement and breach of good faith)

could have been pursued against Mr Biddle. In any case, the breaches are similar enough in nature to be globalised into one breach.

[25] While Mr Biddle has not engaged with the process, he appears to lack the means to pay a penalty as Mr Sharp provided the Authority with information showing that there is an existing personal property security interest (PPSR) against one of Mr Biddle's vehicles. A second PPSR interest on another vehicle has recently expired.

[26] An important object of the Act is recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on the legislative requirement of good faith behaviour. Mr Biddle's actions undermine these pillars of trust and confidence and good faith. He has shown no remorse and neither has he attempted to mitigate the impact his actions have had on his employer by returning the requested files and documents. There is a strong need for deterrence and a penalty at the higher end of the scale is warranted. Cumulatively considered, I conclude that the appropriate penalty is \$8,000 half of which is to be paid to GDL and the remainder to the Crown Bank Account.

Contempt proceedings?

[27] Mr Sharp invites the Authority to exercise its powers under s 196 of the Act to issue a warrant committing Mr Biddle to a term of imprisonment not exceeding six months. However, the Authority has no such power to do so.

[28] Section 196 allows for certain parts of the Contempt of Court Act 2019 (COCA) to apply (with the necessary modifications) to proceedings in the Authority. However, those modifications do not extend to making the Authority a "court" for the purposes of the COCA. Instead, a Member of the Authority is a "judicial officer" and while a judicial officer may, pursuant to s 10 of the COCA, cite a person for wilfully disrupting proceedings or order that such an individual be taken into custody until the end of the day, the Authority cannot imprison for contempt of a court order. That is a matter for a court which the Authority is not.

[29] While GDL's application for Mr Biddle to be committed to a term of imprisonment by the Authority must fail, it remains open to Mr Gubb to approach the

Employment Court to enforce the Authority's compliance order against Mr Biddle under s 140(6) of the Act.

Costs

[30] On 2 May 2022, Practice Note 2, Costs in the Employment Relations Authority, came into effect.³ Among other things, the practice note reaffirmed the Authority's use of the notional daily tariff (currently \$4,500 for the first day of any matter and \$3,500 for any subsequent day of the same matter) as the starting point in assessing costs.⁴ Various factors and principles may have the effect of increasing or decreasing the amount of costs awarded.

[31] In addition to the principle that: costs generally follow the event, the discretion to award costs should be exercised in accordance with principle rather than arbitrarily, and that costs be modest, the Authority takes into consideration that GDL was successful with its preliminary application for a compliance order. It has also been successful with its substantive matter against Mr Biddle. I consider the preliminary and substantive determination to be the equivalent of a one and a half day investigation meeting. While I acknowledge that GDL's legal costs far exceed what can fairly and reasonably be awarded in costs, I consider \$6,750 to be an appropriate amount to award as a contribution to the applicant's legal costs.

Peter Fuiava
Member of the Employment Relations Authority

³ See www.era.govt.nz/assets/Uploads/practice-note-2.pdf.

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].