

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 349  
3033391

BETWEEN PAYNES ALUMINIUM  
LIMITED  
Applicant

AND SHANE LAING  
Respondent

3031971

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Applicant

AND PAYNES ALUMINIUM  
LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Greg Bennett for Paynes Aluminium Limited  
Warwick Reid for Shane Laing

Investigation Meeting: 12 November 2018

Oral Determination: 12 November 2018

Record of Oral  
Determination: 14 November 2018

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**RECORD OF ORAL DETERMINATION OF THE AUTHORITY**

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- A. Paynes Aluminium Limited's application for damages and penalties is declined.**
- B. Mr Laing is ordered to pay to Paynes Aluminium Limited the sum of \$300 towards its costs within 28 days of the date of this**

**determination under matter number 3031971.**

- C. Paynes Aluminium Limited is ordered to pay to Mr Laing the sum of \$3,000 as a contribution to his costs within 28 days of the date of this determination under matter number 3033391.**

**Employment relationship problem**

[1] Paynes Aluminium Limited (PAL) is in the business of supplying wholesale aluminium products at various locations around New Zealand including Tauranga. Mr Laing was employed as a warehouse assistant in PAL's Tauranga warehouse.

[2] Mr Laing's role as a storeman required him to pick and pack orders, deliver orders, deal with customers and do stock control duties.

[3] On 10 April a customer of PAL emailed the store manager in Tauranga seeking a meeting the following morning. The customer had become concerned that Mr Laing was advertising on Trademe and Facebook seeking aluminium fabrication work including pergolas, gates, fences and other small jobs. The customer was concerned that Mr Laing would be in direct competition to the customers' business. The customer was concerned that Mr Laing may have had access to its confidential information and that he could use that information to compete with it.

[4] PAL became concerned about the actions of Mr Laing and the potential damage to its business. Following a disciplinary process Mr Laing was issued with a final written warning. Mr Laing proceeded on a period of sick leave supported by a medical certificate during which time he resigned. By agreement Mr Laing was paid his notice in lieu of having to return to work.

[5] Mr Laing challenged his resignation in the Authority but withdrew his application before it could be investigated and determined.

[6] This claim by PAL was raised as a counter-claim in its statement in reply. Given the seriousness of the claim PAL was directed to lodge and serve its own statement of problem setting out fully the facts on which it relied in making its claim.

[7] PAL says that by starting his own business while still employed Mr Laing was in breach of his duty of fidelity and that he breached his duty to act in good faith when he purchased aluminium and told PAL that it was for family. PAL seeks damages and the imposition of penalties against Mr Laing. Mr Laing denies breaching any duties.

### **Issues**

[8] In order to resolve PAL's employment relationship problems I must determine the following issues:

- a) Did Mr Laing breach his duty of fidelity and if so, is PAL entitled to damages and in what amount?
- b) Did Mr Laing breach his duty of good faith and if so should any penalties be imposed and in what amount?

[9] 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 as a result. It has not recorded all evidence and submissions received.

### **Breach of duty of fidelity**

[10] All employees have an implied duty of fidelity which requires an employee not to engage in conduct that is likely to damage the employers business or undermines the relationship of trust and confidence which must exist between an employee and an employer.<sup>1</sup>

[11] After considering all of the evidence I have concluded Mr Laing did not compete with the business of PAL. Mr Laing was interested in using his fabrication skills to make aluminium gates, fences, pergolas and other small jobs during his weekends when he was not working, in order to supplement his income from PAL. PAL was not in the business of fabricating products – it sold long run aluminium.

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<sup>1</sup> *Walden v Barrance* [1996] 2 ERNZ 598.

[12] In order to assess whether there was a market for him Mr Laing established facebook and trademe pages using images from other websites to show what type of work was possible.

[13] I have accepted Mr Laing's evidence that he did not obtain any orders from his advertisements on Trademe or facebook and did not purchase any aluminium products from PAL for the purposes of his proposed business. He accepts he purchased aluminium product for work undertaken for himself and his Aunty and that this was done with the consent and approval of his manager.

[14] Mr Laing asserts that he had a right to use his skills in aluminium fabrication to work in his own time to make additional income. He was not employed by PAL as an aluminium fabricator and was not in competition with his employer.

[15] The issues raised by PAL in this application were all matters that were raised during a disciplinary investigation conducted by PAL following the complaint by its customer. During that process Mr Laing agreed to remove the Trademe and Facebook advertisements and did so.

[16] The possibility of a breach of fidelity by Mr Laing was something that was known to PAL at the time it made its decision to issue Mr Laing with a final written warning. In the letter confirming the outcome of the disciplinary process PAL sets out its main concerns including the potential of creating a conflict of interest, the failure to disclose the business venture and concerns that Mr Laing intended to use his staff purchasing benefits in the course of running his business. Further the letter confirms PAL's view at that time that Mr Laing's conduct had damaged its commercial reputation. PAL determined that this behaviour warranted a final written warning which Mr Laing did not challenge.

[17] There is no evidence Mr Laing breached any obligations he had to PAL once it had drawn Mr Laing's attention to the possible breaches during the disciplinary process and in the final written warning. If Mr Laing had failed to take down his advertisements PAL would be on a stronger footing but as events transpired Mr Laing removed his advertisements and could not be said to be in breach of any duty owed.

[18] After receiving the final written warning Mr Laing went on a period of sick leave and resigned from his employment. There is no evidence that following the warning Mr Laing breached any of his obligations.

[19] I am satisfied any breach of Mr Laing's obligations were dealt with during the disciplinary process and by the issue of the final written warning. If I am wrong about that, I have concluded that no damages have been established and would not be awarded against Mr Laing.

### **Damages**

[20] PAL has not established any loss caused as a direct result of any conduct by Mr Laing despite telling the Authority it would do so.

[21] Further, PAL claims \$2,000 damages to cover the travel and accommodation costs of an employee brought to Tauranga to work at the warehouse due to what it says was Mr Laing's decision not to return to work during his notice period.

[22] I am satisfied it was not Mr Laing's decision not to return to work. Mr Laing emailed the regional manager and asked not to work out his notice period and instead be paid in lieu. The regional manager agreed that it would not be in either parties interests to enforce the notice period. That was a decision by PAL, not Mr Laing. Any costs associated with that decision can not be sheeted home to Mr Laing.

[23] PAL's application for damages for a breach of fidelity and for travel and accommodation is declined.

### **Breach of good faith**

[24] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Specifically that requires the parties to be active and constructive in maintaining a productive employment relationship by being responsive and communicative and to do nothing that will or is likely to be misleading or deceptive.

[25] PAL says Mr Laing breached his statutory obligations of good faith when he purchased aluminium at discount prices and advised PAL the purchase was for family.

[26] During the disciplinary process and at the investigation meeting Mr Laing was adamant that he purchased the aluminium to build a roof for himself and his Aunty. PAL gave Mr Laing approval to purchase aluminium at a discount price prior to Mr Laing commencing work on his own roof. Mr Brown told me he became aware at least one month prior to the disciplinary process that Mr Laing had purchased aluminium to build a roof for his Aunty. The aluminium was still in the warehouse when Mr Laing explained to Mr Brown what it was for. At that time Mr Brown did not raise any concerns and did not take any steps to prevent Mr Laing from continuing with the work. On balance I have concluded that was because it was for family and it was accepted that Mr Laing was doing the work for his Aunty in his own time.

[27] I have concluded no breach of section 4 has been established. In reaching that conclusion I have taken into account that these issues also formed part of the disciplinary process and were clearly addressed by PAL when it issued Mr Laing a final written warning.

[28] If there was a breach of good faith, it was not sustained and serious and no penalty would be imposed.

### **Costs**

[29] I have dealt with the costs for both Mr Laing's originating application (matter number 3031971) and this matter in this determination. Costs in the Authority are modest and must be approached in a principled manner. The primary principal is that costs follow the event.<sup>2</sup> Costs in the Authority are normally awarded on the basis of a daily tariff.

### ***3031971 costs***

[30] Mr Laing lodged an application on 4 July 2018 claiming he had been constructively dismissed and seeking remedies. PAL's statement in reply including a counter-claim was lodged on 16 July. On 25 July Mr Laing withdrew his application. PAL seeks reimbursement of its costs associated with that application.

[31] Costs in the Authority are modest and extend to a situation in which an applicant elects to withdraw a proceeding at any stage prior to the issue of a

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<sup>2</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808;

determination. Mr Laing's claim was withdrawn within a month of being lodged. No formal steps had been taken in progressing his application by the Authority.

[32] Having fully considered the matter I consider it appropriate that Mr Laing make a contribution to the costs of the respondent. Mr Laing is ordered to pay to Paynes Aluminium Limited the sum of \$300 towards its costs within 28 days of the date of this determination.

### ***3033391 Costs***

[33] Mr Laing has been successful in his defence of PAL's claims against him. The investigation meeting took just over half a day including the issue of this oral determination. This would normally result in a contribution in the order of \$2,250. Mr Laing seeks \$5,000 indemnity costs.

[34] In support of his application Mr Laing says the conduct of PAL has increased his costs including the failure by PAL to provide witness statements of two witnesses it advised the Authority would attend the investigation meeting. Mr Laing says he had to prepare his case without having full information about what may or may not be provided to the Authority at the investigation meeting and this has led to an increase in his costs.

[35] I agree with the submissions made on Mr Laing's behalf that there was an expectation that PAL would produce evidence of the loss it says was caused by Mr Laing's actions. I accept that having to prepare for an investigation meeting where such evidence was unknown has led to an increase in costs. Such increase, in my view, supports an uplift.

[36] In all the circumstances of this case an appropriate contribution to costs is \$3,000. Paynes Aluminium Limited is ordered to pay to Mr Laing the sum of \$3,000 as a contribution to his costs within 28 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority