



Personal Penalties for Breach of Employment Agreement

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- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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A recent decision considers an often asked question and is the first to provide for personal penalties against an individual for breaches of good faith. The matter, **Nicholson v. Ford** was an appeal by Alan Nicholson against an Authority decision finding him personally liable for breaches of good faith against Matthew Ford. Allan Nicholson was the Director, Chief Executive and a Shareholder in a dental practice, Clinico, that employed Mr Ford as an accounts administrator. Mr Nicholson wished to restructure the company that employed Mr Ford. Mr Nicholson was responsible for the redundancy process that ultimately led to Mr Ford's dismissal.

Mr Ford was unable to pursue a personal grievance claim for unjustified dismissal because the company was placed in voluntary liquidation before the matter could progress to the Authority and the Liquidator did not agree to allow the case against the employing company to continue.

In the alternative Mr Ford sought an action against Mr Nicholson, claiming a penalty under s.134 of the Employment Relations Act for instigating, aiding and/or abetting a breach of his employment agreement.

Mr Ford had been employed by Clinico for two years as an accounts administrator within the Accounts Department. There were only three people within the department, Mr Ford, the Manager and Mr Nicholson's wife. In January 2018 Clinico proposed to restructure the department, during the consultation process the Manager resigned. In all Mr Ford and his representatives met with Mr Nicholson on behalf of Clinico on four occasions and by the time the matter was concluded he had been absent on sick leave for a number of weeks. In the earlier stages of the consultation process the parties had attempted to negotiate a mutual exit. When that was not successful Mr Ford sought additional financial information to enable him to comment fully on the proposal.

In the words of the Employment Court, "*(r)ather than providing Mr Ford with the requested information, Mr Nicholson became belligerent, combative and unresponsive. This is most graphically seen in his subsequent communications with Mr Ford's legal counsel, who renewed requests for relevant information on Mr Ford's behalf.*"

Mr Nicholson in his evidence regarded these requests as a mechanism to extract money from the company and ultimately, he threatened Mr Ford with legal proceedings.

In the first decision, which was accepted by the Court, the Authority found four breaches of Mr Ford's employment agreement:

1. A failure to provide sufficient and reasonably requested financial information to enable Mr Ford to make a meaningful response to the proposition that his position was not sustainable.
2. A failure to share financial analysis comparing the viability of Mr Ford's role and that of Mr Nicholson's wife. This supported statements from Mr Nicholson that he would not dismiss his wife.
3. Mr Nicholson was openly critical, and dismissive of, and abusive to, Mr Ford's representatives.
4. His breaches were 'compounded by his threat to sue Mr Ford for distress that he (Mr Nicholson) and his wife had suffered as a result of the process. The threat included a threat of action for the following:

- *Hurt and humiliation caused to both myself and my wife during this process.*
- *Legal costs and advice incurred.*
- *Stress caused to both myself and my wife, verified by medical experts"*

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson, Peter Zwart** or **Dean Kilpatrick**.

Contact Details:

Level 2
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Raewyn Gibson
E: raewyn@mgz.co.nz
M: 0274 387 802

Peter Zwart
E: peter@mgz.co.nz
M: 0274 367 757

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

During the hearing in the Court Mr Nicholson conceded that his *“actions fell within the ambit of s 134, that Mr Ford's employment agreement had been breached and that the dismissal for redundancy was procedurally and substantively unjustified.”*

Mr Nicholson argued that a penalty was not appropriate because the mistakes were simple mistakes and that penalties against an individual in circumstances where the employer was in liquidation would ‘open the floodgates’:

“He submitted that such a finding would expose lawyers, accountants, human resources officers, chief executives, and a raft of other people who had had some minor input into a flawed restructuring process, to a potential penalty.”

The Court, determined that Mr Nicholson had instigated, aided and/or abetted a breach of Mr Ford's employment agreement and awarded a penalty of \$7,500.00 against Mr Nicholson personally. While there have been other personalised penalties awarded for breaches of minimum standards, this is the first we are aware of in the Employment Court. Given that it was found to be one breach, the award of \$7,500.00 (75% of the maximum) was a significant one.

Incidentally and in passing, the Court responded to a rhetorical question from Mr Nicholson *“as to why it was fair that an employee could pursue a claim for stress against an employer in the circumstances of the present case, but an employer could not raise a similar claim against an employee.”*

It is a question that we have been repeatedly asked over the years. The Court responded dealing with the particular facts of the case:

“While it was no doubt irritating to Mr Nicholson to be asked for financial information underpinning his assertions that the company needed to restructure, it is well established that an employer is required to provide relevant information, whether they like it or not.”

The complete answer to the frequently asked question is that the Employment Relations Act is largely protective of employee's rights and does not provide for the right of employer to pursue such an action.

This case emphasises the risks for individuals acting on behalf of companies. In some minimum standards cases the Courts have granted penalties against the company and responsible individuals. In theory this could happen here too.

Employment Relations Practice Course

Our next Employment Relations Practice Course has been set down for **Wednesday 16 and Thursday 17 October 2019**.

Topics covered include:

- Pre-employment
- Dealing with absences from the workplace
- Discipline and Termination
- Performance Management
- Holidays Act
- Parental Leave
- Negotiations and Good Faith
- Redundancy and Restructuring
- Introduction to Health and Safety
- Policies
- Legislative Updates

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training



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