



## The Law has teeth . . .

### Client Services:

- 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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The Employment Standards legislation enacted in 2016 included some harsh new provisions for serious breaches of the Act, including pecuniary penalties and orders banning an employer from employing staff. [See The Advocate, Issue 253].

A recent case, **A Labour Inspector v. Victoria 88 Limited t/a Watershed Bar and Restaurant and Gordon Leslie Freeman** [2018] NZEmpC 26, examined those new provisions and resulted in declarations that breaches of minimum standards had occurred, and the imposition of penalties and banning orders.

The application to the Employment Court by the Labour Inspector sought:

- a) declarations of breach, in relation to breaches of minimum entitlement provisions under the Holidays Act 2003 (HA) that were asserted to be serious;
- b) pecuniary penalty orders, for breaches of those minimum entitlement provisions; and
- c) banning orders for breaches of those minimum entitlement provisions."

The case is slightly unusual in that while the Labour Inspector initially applied to the Court for remedies, the Inspector and the employer reached an agreement as to the remedies, which were then put before the Court to issue as orders of the Court, a process which required the Court to be satisfied that the position agreed between the parties was appropriate given the facts of the case. In doing so, the Court made it clear that the outcome should not be seen as setting any precedent, no doubt due to the fact that the pecuniary penalties ultimately awarded were not particularly high:

"[7] For the avoidance of doubt, I have been required to consider an "agreed position" reached by the parties, which has avoided the need for a defended hearing. The orders which I make later in this judgment, while appropriate to the facts of this case, should not be regarded as setting any precedent for future applications dealing with the penal provisions contained in either Part 9A of the Act, or elsewhere in that legislation or in legislation dealing with minimum standards of employment."

The case involved the non-payment of holiday pay to two employees. The Court judgment included the following statement of facts:

"7. The first and second defendants employed the employees on a standard template employment agreement, which includes a clause purporting to allow the forfeiture of final pay including holiday pay equivalent to the proportion of default by any employee in providing less than the agreed 6 weeks notice (the forfeiture clause), as follows:

'12.1 Employment may be terminated by either employer or employee on 6 weeks notice of termination being given in writing. The employer may elect to pay six weeks wages in lieu of notice, and in the event that the employee fails to give the required notice then equivalent wages shall be forfeited and deducted from any final pay including holiday pay.

"8. Each of the employees referred to in this proceeding agreed to the terms in the employment agreement.

9. The first and second defendants withheld holiday pay owing to the employees on the ending of employment where the employees breached the notice obligations in their agreements. In all but one example the employees failed to provide any notice, and in particular, where the following witnesses were owed:

- a. Dawn Thompson - \$1,173.97
- b. Penny Wealleans - \$1,858.50.

10. The second defendant made the decision to withhold holiday pay from the employees, advised to the plaintiff by email to the first and second defendant's accountant."

## 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 **Neil McPhail, Raewyn Gibson,** or **Peter Zwart**.

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A Labour Inspector then became involved, and investigated the circumstances surrounding the non-payment of holiday pay to the two employees. The investigation revealed that other companies owned by Mr Freeman had been involved in proceedings before the Employment Relations Authority and the Employment Court, in relation to the same issue, i.e. forfeiture of holiday pay for the failure to give contractual notice. There were four sets of proceedings in which the Employment Relations Authority determined that Mr Freeman's company could not rely upon the forfeiture clause, and a fifth proceeding, an unsuccessful challenge to the Employment Court, where the Court affirmed that the forfeiture clause amounted to a penalty provision and was thus unenforceable [See *The Advocate*, Issue 245]. These judgments were delivered between 2013 and 2015.

Despite all of these judgments Mr Freeman and his company, Victoria 88, still sought to rely upon the forfeiture clause, and by this time the law relating to breaches of minimum standards had been enacted, aimed particularly at repeat or serious offenders, allowing the Labour Inspector's to make applications for declarations, penalties and banning orders.

The Court considered the various aspects of the law, including the significance of banning orders and the extent to which pecuniary penalties should be granted, in light of the fact that the level of penalty available for serious breaches is \$50,000.00 for an individual and \$100,000.00 for a company. The Court then proceeded to consider the nature and number of the breaches, the severity of them, the financial circumstances of the parties, and the proportionality of the outcome, including what part of the penalty would be paid to the employees.



The Court concluded that Victoria 88 had on Mr Freeman's instructions, failed to pay holiday pay and that Mr Freeman had directed Victoria 88 to do so; and applied the following banning order:

*"[59] The following banning orders are made:*

- a) *Victoria 88 shall not enter into any employment agreement as an employer or be involved in the hiring or employment of employees for a period of three years from the date of this judgment.*

- b) *Mr Freeman shall not enter into an employment agreement as an officer; or be an officer of an employer; or be involved in the hiring or employment of employees for a period of three years from the date of this judgment."*

As to the breaches, the Court said:

*"[28] The parties agreed that these breaches were serious, taking into account that the background of the subject breaches comprised a series of instances involving a number of different employees, that the first and second defendants' actions were intentional, and that those breaches followed decisions of the Employment Relations Authority, and the Court, involving Mr Freeman."*

Pecuniary penalties were awarded amounting to \$10,000.00 each for Victoria 88 and Mr Freeman, part of which was payable to the employees:

*"[61] The following pecuniary penalties are ordered:*

- a) *Each of Victoria 88 and Mr Freeman are to pay a pecuniary penalty of \$10,000.*
- b) *Those penalties are to be paid to the Registrar of the Employment Court. In respect of the pecuniary penalty payable by Mr Freeman, the sum of \$7,845 is to be paid to the Labour Inspector for disbursement to the individuals and in the amounts described in the Appendix to this judgment. The balance of those sums shall be paid to a Crown bank account."*

The outcome of this case shows that the relatively recent Employment Standards legislation has teeth. Employers who flout labour standards are liable to substantial penalties and banning orders, thus discouraging or preventing future breaches.

Most employers will not face proceedings of this nature, which are targeted at the "worst transgressors" (according to the commentary to the Bill upon its introduction). However, the case does highlight the dangers of seeking to apply forfeiture provisions in employment agreements. Clients are well advised to check their agreements to ensure that forfeiture provisions have been removed.