

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA**

[2023] NZERA 598
3205839

BETWEEN CALEYS LIMITED
Applicant
AND TEINA DEADMAN
Respondent

Member of Authority: Davinnia Tan
Representatives: Cyril Ross Pepper for the Applicant
Respondent in person
Investigation Meeting: On the papers
Submissions received: 11 September 2023 from the Applicant
29 September 2023 from the Respondent
Determination: 13 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Deadman commenced employment as a sales representative with Caley's Limited (Caley's) on 14 September 2022 and resigned on 21 November 2022, with an effective date of 22 November 2022. Caley's Limited trades as Caley's Blinds and is located in Tauranga.

[2] On 18 November 2022 Ms Deadman spoke to Cyril Pepper, one of the two directors of Caley's Limited, and indicated her intention to resign. Ms Deadman shared her concerns with Mr Pepper that the workplace was too noisy and not conducive to her learning of the new role. They discussed managing her current workload and Mr Pepper noted that her individual employment agreement (IEA) required employees to provide

a month's notice for a resignation or forfeit a month's salary. Ms Deadman did not resign that day.

[3] On 21 November 2022, Ms Deadman called Caley's sales manager, Lisa Pepper, to advise she was resigning. Ms Pepper reminded Ms Deadman of the requirement in her individual employment agreement (IEA) to provide a month's notice. Later that afternoon, Ms Deadman provided her resignation in writing by email to Mr Pepper and cited "unforeseen circumstances with the recurrence of Vertigo" as reasons for resigning and noted her resignation would be effective as of 22 November 2022.

[4] Caley's seeks from Ms Deadman a month's wages of \$3,157.67 on the basis that the IEA between Ms Deadman and Caley's Limited provides for a forfeiture of a month's salary in lieu of a month's notice provided for termination ("the forfeiture clause").

[5] Caley's wrote to Ms Deadman on 5 December 2022 and 15 December 2022 seeking payment of \$3,157.67 and advised Ms Deadman that it would commence legal action if this was not paid. To date, no payment has been made.

[6] On 19 December 2022 Caley's lodged a statement of problem with the Authority.

The Authority's investigation

[7] On 28 August 2023 a case management conference was held with the parties in which they agreed to provide sworn witness statements and have the Authority investigate and determine the matter on the papers. Mr Pepper, company director for Caley's, provided a witness statement and submissions on its behalf. Ms Deadman provided a witness statement and submissions. Mr Pepper provided a reply to Ms Deadman's submissions.

[8] 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

[9] The issue requiring investigation and determination is whether the forfeiture clause in the IEA is enforceable and whether Caleys is entitled to claim from Ms Deadman, the amount of \$3,157.67.

Is the forfeiture clause enforceable?

[10] The forfeiture clause in the IEA provides as follows:

The engagement shall be terminable by one month's notice in writing from either party, or payment or forfeiture of a month's salary/wages in lieu thereof [...]

Caleys' submissions

[11] Caleys submitted that the purpose of the forfeiture clause in Ms Deadman's IEA is to "compensate for the loss/cost" that it "will incur as a direct result of the employee failing to give the direct notice". The notice period was required to allow Caleys time to advertise for a replacement or put arrangements in place to cover the employee's workload.

[12] Caleys stated that the period in which Ms Deadman resigned was Caleys' busy period (September to Christmas each year). Caleys says that three weeks prior to Ms Deadman's resignation, it had generated an excess of 160 enquiries following a home show. These enquiries were allocated to the sales team including Ms Deadman who was allocated 69 enquiries to deal with.

[13] Caleys considers that had Ms Deadman provided the requisite notice, her last day would have been 20 December 2022. Caleys says "no replacement for Ms Deadman was employed before [the] Xmas [sic] break up". Therefore her work was undertaken by the sales manager and the company director which involved them working outside their normal hours and included the "opportunity cost of them not undertaking other business". Caleys claims Ms Deadman's resignation without notice cost the business \$7,040.00. This is because the sales manager had worked 4 weeks at 20 hours per week costing Caleys \$4,800.00 and the company director had worked 4 weeks at 20 hours per week costing Caleys \$2,240.00; a sum of \$7,040.00. Caleys notes that had another sales consultant was available to undertake the work, then the cost would be more closely aligned to Ms Deadman's monthly salary, \$3,157.67 which is the amount Caleys is claiming as a loss/cost to the business.

[14] Caleys considers that Ms Deadman should be held accountable because she had agreed and signed the IEA which sets out clearly the forfeiture of a month's salary in the event she does not provide a month's resignation notice. Further, she was reminded on two occasions about this term of her IEA but chose not to comply.

Ms Deadman's submissions

[15] Ms Deadman stated that she was diagnosed with viral vertigo in May 2022. When she interviewed for the role at Caleys, she informed Ms Pepper that she suffered from vertigo as a health condition. Following acceptance of the position, Ms Deadman had what she described as an "attack of vertigo" and advised Ms Pepper that she "should now decline the position". However she was persuaded not to. Ms Deadman therefore says that Caleys was fully aware of her health problem from the outset.

[16] Ms Deadman stated that soon after starting at Caleys, she found the work environment not conducive for her learning of the job and felt Caleys was understaffed at the time because she was the only sales representative and required training. Ms Deadman was conscious that the home show was imminent and stated she felt stressed. She cited an instance where she had to stay late at work for training without prior notice at Mr Pepper's request and felt micromanaged by Ms Pepper.

[17] Ms Deadman said that on 17 and 18 November 2022, she suffered from vertigo. On 18 November 2022, she then raised concerns with Mr Pepper about her health and aspects of the job which she found challenging but felt that no genuine effort was made to address those issues. She noticed her health began to suffer from vertigo and work-related stress so after the weekend, she decided to put her health and wellbeing first. Ms Deadman says she did not feel she was able to work to full capacity and therefore resigned without providing a month's notice.

[18] Ms Deadman says she then arranged to meet Ms Pepper to return the company car and do a handover of her customer portfolio. Ms Deadman said that following the meeting, Mr Pepper came into the office and again informed her of the forfeiture clause. She said she asked him to reconsider and not to impose the forfeiture clause on her. Ms Deadman further notes that at no stage was she offered sick leave or asked for a medical certificate.

[19] Ms Deadman says that she believed she was doing the right thing at the time by informing Caleys that she was not able to perform to the best of her ability.

[20] Ms Deadman also submitted that she does not believe Caleys suffered any financial loss as a consequence of her resigning without providing a month's notice as she had "worked through all [her] customers from the home show and existing customers" and achieved a high number of sales as a result.

Forfeiture clauses

[21] The law on forfeiture clauses recognises that they are generally unenforceable against employees for failure to work their notice period unless the employer has suffered an actual loss.¹ This is because forfeiture clauses are considered as imposing a penalty rather than recovering a loss to the employer.

[22] The issue is not whether the requirement to give a month's notice is unreasonable, but whether the forfeiture of a month's wages arose from a genuine assessment of liquidated damages as a result of not providing notice or arose from an intention to secure performance of the notice provision. If the true purpose of the clause was to compel performance by holding over them the threat of losing wages for non-compliance, then it is a penalty provision which in equity and good conscience, is not enforceable.²

[23] As Judge Goddard stated in *Ozturk v Gultekin*³

Courts of equity and Courts of conscience have always turned their backs on any agreement that imposes a penalty or a forfeiture. It is one thing for the parties to agree, as part of a settlement, that damages are payable in the event of a particular breach. If the amount agreed on is a genuine estimate of the loss that the parties expect will be caused if there is a breach of the contract, then that estimate is called liquidated damages and is recoverable. However, if the amount concerned is not a genuine pre-estimate, but is an attempt to compel performance by holding it as a threat over the head of one of the parties, it becomes a penalty and will not be recoverable. This is because equity takes the view that it is unconscionable in a case of breach of contract to recover a sum which is out of proportion to the loss which actually occurs.

[24] This means that for Caleys to enforce the forfeiture clause, it would need to establish that it sustained an actual business loss consequent upon Ms Deadman's

¹ *GL Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120; *Ozturk v Gultekin* [2004] 1 ERNZ 574; *JPB Building Contractors 2006 Ltd v Paul* [2019] NZERA 184; *A Labour Inspector v Kings Curry House Ltd t/a Tandoori King* [2017] NZERA 45; *WYF International Company Ltd t/a Warm Kiwi Insulation v Dowd* [2014] NZERA 521.

² *GL Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120.

³ *Ozturk v Gultekin* [2004] 1 ERNZ 574 at para 5.

actions and that the loss suffered amounted to Ms Deadman's monthly wage. A speculative claim, including opportunity costs, will not be successful.

[25] Caley's stated that the purpose of the forfeiture class is compensatory in nature, that it did not replace Ms Deadman's vacancy despite the busy period and therefore had to pass Ms Deadman's work onto the sales manager who was paid in excess of \$60 an hour, and the company director who was paid in excess of \$28 an hour, costing Caley's a sum of \$7,040.00 because they had to work "after hours and weekends etc". While Caley's is only seeking the sum of Ms Deadman's monthly wage, it did not provide formal financial documentation (such as payslips) to support Mr Pepper's witness statement in which he explained how he calculated the cost.

[26] In *GL Freeman Holdings Ltd v Livingston*⁴ the employer made similar submissions that the purpose of the clause was a genuine estimate of the loss caused by the employee's failure to give requisite notice because resources of other staff was diverted due to the resignation, including hiring and training costs. However it was accepted that such costs are incurred in any event when an employee resigns and are not limited to resignations without requisite notice. As such, the Employment Court found that the employer did not suffer any actual loss, and that in a court of equity and conscience, the equivalent of the employee's wages was not recoverable.

[27] In these circumstances, I note Caley's' decision not to fill Ms Deadman's vacancy during what it stated was its busy period and instead passed Ms Deadman's work onto its sales manager, Ms Pepper, and paid at a higher wage than a sales representative, and to a company director.⁵ In his witness statement, Mr Pepper referred to a "sales team" when discussing the allocation of queries that arose from the home show, yet Ms Deadman's work was allocated to higher paid staff.

[28] Caley's has characterised the payment of wages to other higher paid staff for working after hours and weekends as a 'loss' and is seeking to recover an amount equating to Ms Deadman's monthly wage. Although I am sympathetic to some inconvenience that would have occurred, upon further scrutiny, I am not persuaded by its submissions and find its calculation of the business 'loss/cost' unsupported by clear and verifiable evidence. I am also cognisant that Ms Deadman was unwell during this

⁴ *GL Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120.

⁵ I note that Mr Pepper and another company director are registered on the companies register, with Mr Pepper being the only company director based in Tauranga.

time, and had she not resigned, she would have remained unlikely to carry out all her tasks, thereby requiring additional resourcing support on the part of Caleys in those circumstances.

[29] I acknowledge that the parties have had a difficult relationship, and both had provided submissions disagreeing on the extent Ms Deadman was fully open about her vertigo diagnosis with Caleys and the level of her performance at work. Unfortunately these matters are not material to the issue at hand, which is whether the forfeiture clause in the employment agreement is enforceable against Ms Deadman.

[30] For the reasons above, I find that the forfeiture clause is by nature a penalty clause designed to compel performance of the notice period and is not a genuine assessment of liquidated damages. Therefore Caleys is not entitled to rely on the forfeiture clause against Ms Deadman.

[31] As Caleys' case is not made out, no orders are made.

Costs

[32] Neither party was represented by counsel or an advocate. Accordingly parties shall bear their own costs.⁶

Davinnia Tan
Member of the Employment Relations Authority

⁶ See [Awarding remedies and costs | Employment Relations Authority \(era.govt.nz\)](#) and [Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi](#).