



# Employment Court of New Zealand

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## G L Freeman Holdings Limited v Livingston [2015] NZEmpC 120 (24 July 2015)

Last Updated: 29 July 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH REGISTRY

[\[2015\] NZEmpC 120](#)

CRC 41/13

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN G L FREEMAN HOLDINGS LIMITED  
Plaintiff

AND DIANE LIVINGSTON Defendant

Hearing: 24 March 2014

Appearances: T McGinn, counsel for the plaintiff  
R Thompson, advocate for the  
defendant

Judgment: 24 July 2015

### JUDGMENT OF JUDGE A A COUCH

[1] The plaintiff operates the Redwood Hotel in Christchurch. The defendant was employed by the plaintiff as a receptionist. The terms of employment were recorded in a written agreement. One of the terms of that agreement required the defendant to give six weeks' notice of its termination or, in default, to forfeit "equivalent wages". The defendant resigned on two weeks' notice. The plaintiff then withheld her final pay which was otherwise due to her as wages and holiday pay.

[2] The issue was whether the provision of the employment agreement relied on by the plaintiff to withhold money due to the defendant was enforceable in law. The Authority determined<sup>1</sup> that the provision in question was not enforceable "because it is in the nature of a penalty to compel performance rather than a genuine assessment

<sup>1</sup> *Livingston v G L Freeman Holdings Ltd* [2013] NZERA Christchurch 90.

G L FREEMAN HOLDINGS LIMITED v LIVINGSTON NZEmpC CHRISTCHURCH REGISTRY [\[2015\] NZEmpC 120](#) [24 July 2015]

of liquidated damages."<sup>2</sup> On that basis, the Authority ordered the plaintiff to pay the defendant the money it had withheld from her. The Authority also determined that the defendant ought to pay a statutory penalty<sup>3</sup> of \$500 for breach of the employment agreement.

[3] The plaintiff challenged the whole of the Authority's determination and the matter proceeded before the Court by way of a hearing de novo. The two issues

before the Court were:

- (a) Whether the plaintiff was entitled to withhold money from the defendant because she failed to give the agreed period of notice.
- (b) The amount of any penalty imposed on the defendant pursuant to s

134 of the [Employment Relations Act 2000](#) (the Act) for breach of the employment agreement.

## Outline

[4] The relevant facts are straightforward and were very largely not in dispute.

[5] The plaintiff company owns and operates the Redwood Hotel, situated in the northern suburbs of Christchurch. It is a relatively large business comprising 27 accommodation units, a large licensed restaurant, conference facilities, a bottle store, 5 bars, gaming facilities and a gym.

[6] The plaintiff's business is managed by its sole shareholder and director, Mr Gordon Freeman. He has done so for more than 20 years.

[7] Ms Diane Livingston is a mature woman with more than 20 years experience in the hotel industry, principally as an administrator, manager and receptionist. Following the Christchurch earthquakes in 2011, she was unemployed and receiving a benefit.

<sup>2</sup> At [33].

<sup>3</sup> Pursuant to the [Employment Relations Act 2000, s 134](#).

[8] Wishing to return to paid employment, Ms Livingston applied for a position of receptionist / administrator advertised by the plaintiff. She was interviewed by Mr Freeman who offered her the position on terms set out in a written employment agreement. The provisions of that agreement at the heart of this case were:

12.1 Employment may be terminated by either employer or employee upon six 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.

6.4 Should the employee be indebted to the employer for wages forfeited due to lack of notice (clause 12.1) or for any other reason (including negligent transaction processing under clause 6.3) or the failure to return property belonging to the employer, the employee agrees that the appropriate sum may be deducted from the employee's wages and/or holiday pay or final pay.

[9] Ms Livingston read the agreement before signing it. She acknowledged that she was aware of clause 12.1 in particular and that, although she considered the requirement for six weeks' notice unreasonable, she did not raise any concern about it with Mr Freeman before agreeing to it. Ms Livingston also acknowledged that she had an opportunity to seek advice about the agreement before signing it but elected not to do so. She said that she acted as she did because she needed the job.

[10] The employment agreement was signed on 20 July 2011 and Ms Livingston began work a week or so later.

[11] Ms Livingston worked for the plaintiff for about a year. In her evidence she said that she was unhappy in her work. In particular, she said that she found it difficult to get along with Mr Freeman, describing him as having "a very aggressive and confrontational style of management". There was no evidence, however, of any specific events which might have caused her to form that view. Equally, there was no evidence that Ms Livingston raised any concerns with Mr Freeman about his conduct or attitude. Mr Freeman's evidence was that Ms Livingston's employment went without incident, that she was experienced and was generally regarded as a good employee.

[12] Ms Livingston decided to look for work elsewhere. On 10 July 2012, she applied for a position with Canterbury Landscape Supplies Limited ("CLS"). Within a few days, she was interviewed and offered a position as "Administration & Customer Services Assistant". It is unclear exactly when this offer was made but Ms Livingston signed a written employment agreement with CLS on 17 July 2012. It was signed at the same time by a representative of CLS and Ms Livingston was given a copy of the fully executed document.

[13] That agreement recorded that her employment by CLS would commence on Wednesday 1 August 2012, that is 15 days later. Ms Livingston acknowledged that, when she signed that agreement, she was conscious of the provision of her employment agreement with the plaintiff requiring six weeks' notice of termination and that she would not be able to comply with that provision.

[14] On 19 July 2012, Ms Livingston handed Mr Freeman a letter of resignation. The operative part of the letter was :

I have been offered a position that involves utilising my computer and accounting skills.

I am eager to accept this new challenge so I am giving two weeks notice. My last day at the Redwood Hotel will be on 1st August 2012.

[15] Ms Livingston knew when she tendered her resignation in this way that she was breaching her employment agreement with the plaintiff.

[16] The following two weeks passed without any issues between Ms Livingston and Mr Freeman. There was no discussion about the consequences of Ms Livingston having given only two weeks' notice. She assisted in training a new staff member employed to replace her but that person left after only a few weeks and another replacement was then engaged. It appears Ms Livingston's last day of work for the plaintiff was 1 August 2012 and that she started work with CLS the following day.

[17] On 6 August 2012, Mr Freeman wrote to Ms Livingston, saying:

Re: employment contract clause 12.1.

Your have forfeited four weeks pay being as only two weeks' notice given.

Copy of contract enclosed shows your contract is no different to anyone else's.

[18] In fact, the sum withheld was \$1,943.50, being the whole of Ms Livingston's final pay. It was common ground that this money was otherwise owing to Ms Livingston as wages and holiday pay and was the equivalent of about 3 weeks' wages.

### Issues

[19] There are three issues:

(a) Was that part of clause 12.1 of the employment agreement providing for forfeiture of wages enforceable?

(b) Should Ms Livingston be penalised for breaching clause 12.1 of the employment agreement by terminating the employment on less than six weeks' notice?

(c) If so, what should be the amount of the penalty?

### Was the forfeiture provision in clause 21.1 enforceable?

[20] The essential issue is whether the forfeiture provision in clause 12.1 should properly be seen as liquidated damages for breach of contract or as a penalty. A genuine and reasonable liquidated damages provision may be enforceable according to its terms. A penalty for breach of contract is generally unenforceable beyond the extent of damage actually suffered.

[21] In his submissions, Mr McGinn helpfully referred me to the leading decisions on this issue. The starting point in relation to contracts generally is the decision of

the House of Lords in the *Dunlop* case.<sup>4</sup>

Although decided 100 years ago, the

judgments in this case provide the basic principles which are still applied with respect to contracts generally. They include:

*4 Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1914] UKHL 1 [1915] AC 79 (footnotes omitted).

(a) The provision should be construed according to its substance and effect rather than the particular words used.

(b) The provision is to be construed according to the circumstances prevailing at the time the contract was made rather than when it was breached.

(c) The essential nature of liquidated damages is a genuine pre-estimate of damages likely to be suffered as a result of the breach of contract concerned.

(d) Any sum payable will be a penalty if it is extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time the contract was made.

[22] The origin of what is sometimes called the rule against penalties lies in equity. As the authors of *Law of Contract in New Zealand*<sup>5</sup> put it:

Courts of equity have taken the view that the promisee is sufficiently compensated by being indemnified for his or her actual loss, and that the promise acts unconscionably if he or she demands a sum which, although certainly fixed by agreement, may well be disproportionate to the injury.

[23] This resonates with the statutory requirement that this Court must exercise its jurisdiction in equity and good conscience.<sup>6</sup> This was emphasised by Goddard CJ in

*Ozturk v Gultekin*<sup>7</sup> where he explained the rule against penalties as follows:

However, the jurisdiction under the

[Employment Relations Act 2000](#),

ultimately being the jurisdiction of the Court, is one of equity and good conscience. 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

<sup>5</sup> John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand*, (4th ed, LexisNexis, Wellington) at 888 (footnotes omitted).

<sup>6</sup> [Employment Relations Act, s 189\(1\)](#).

in a case of breach of contract to recover a sum which is out of proportion to the loss which actually occurs.<sup>8</sup>

[24] There appear to have been no previous decisions of this Court or its predecessors on the application of these broad principles to a contractual claim for payment consequent upon a failure to give an agreed period of notice of termination of employment. A case decided in the UK, however, shows how such provisions may be viewed.

[25] In *Giraud UK Ltd v Smith*<sup>9</sup> the employment agreement between the parties provided that four weeks' notice of termination should be given and that "...failure

to give the proper notice and work it will result in a deduction from your final

payment equivalent to the number of days short."<sup>10</sup>

The employee, a truck driver,

left without providing any notice and, relying on the agreement, the employer withheld the equivalent of four weeks' pay. At first instance, the Employment Tribunal found that the clause was a penalty provision in that its manner of calculation bore no resemblance to the loss actually suffered by the employer, noting

that drivers could easily be replaced.

[26] The Employment Appeal Tribunal agreed with this assessment, noting that:<sup>11</sup>

It is of significance that the clause in this case did not seek to place any limitation on the right of the employer to recover damages for his actual loss in the event of it being greater than that specified in the clause and the calculation which it laid down. Thus, in the present case, the employee is

in a position where if the actual loss turned out to be nil the employee is liable for the calculable sum, but if the actual loss is greater than the calculable sum he may face an unlimited claim for the balance. This is a matter which weighed heavily on the Employment Tribunal. It also weighs heavily on us.

In our judgment, it is difficult to see how in these circumstances the clause can represent a genuine pre-estimate of loss. Moreover, we agree with the implicit finding of the Employment Tribunal that the clause, by reason of this aspect of its application, is an oppressive clause because it takes a form which can be described colloquially as "heads, I win, tails you lose.

<sup>8</sup> At [5].

<sup>9</sup> *Giraud UK Ltd v Smith* [2000] IRLR 763.

<sup>10</sup> At [3].

<sup>11</sup> At [10]-[11].

[27] As all the decided cases in this area of law emphasise, the proper construction of any particular contractual provision will depend to a large extent on the facts. In particular, the Court must have regard to the knowledge and understanding of the parties at the time the employment agreement was made.

[28] In his evidence, Mr Freeman agreed that the plaintiff suffered no financial loss as a result of Ms Livingston giving only two weeks' notice. Rather, he said that Ms Livingston's pay was withheld "to compensate the company for the stress and hassle".

[29] Mr Freeman was asked to explain in detail how he went about recruiting and

training a new staff member to take over Ms Livingston's role.<sup>12</sup>

After describing

the process in some detail, Mr Freeman agreed that the cost to the plaintiff of recruiting and training a new receptionist was the same regardless of the period of notice the incumbent gave. In particular, he said the wage costs were the same. He also said that he was aware at the time Ms Livingston was employed that this would

be so.

[30] The only practical effect of receiving less than six weeks' notice from Ms Livingston that Mr Freeman could identify was that a part time receptionist was called on to work more hours than she might otherwise have done during the period after Ms Livingston had left and before a new recruit was fully trained. He agreed again, however, that this did not increase the cost to the plaintiff because it was no

longer paying Ms Livingston.

[31] Mr Freeman was also asked about the form of employment agreement the plaintiff had with other staff. He said that every employment agreement contained a requirement for six weeks' notice and the provision for forfeiture of wages set out in clause 12.1 of Ms Livingston's agreement. Mr Freeman said the plaintiff employed

about 70 staff doing a range of jobs in the hotel, restaurant and bars.

12 This was very largely in answer to questions from the Court. Ms Livingston was represented by an agent experienced in employment matters but who had no general legal training or experience. In order to understand the essential facts fully, therefore, the Court exercised its power to call for evidence – [Employment Relations Act, s 189\(2\)](#).

[32] Having regard to this evidence, it is clear that, at the time the employment agreement between the parties was made, neither Mr Freeman nor Ms Livingston contemplated that termination of the agreement on less than six weeks' notice would cause any monetary loss to the plaintiff. It is equally clear that the plaintiff actually suffered no monetary loss as a result of Ms Livingston giving two weeks' rather than six weeks' notice.

[33] That leaves Mr Freeman's statement that the forfeiture provision was to compensate the company for stress arising out of a reduced period of notice being given. When asked to explain this, Mr Freeman suggested that he found it more stressful having to recruit new staff when less than six weeks' notice was given. He also suggested that it might be more stressful for the part time receptionist who was called to work additional hours after Ms Livingston left. I found this evidence unconvincing and place little weight on it.

[34] In any event, the obvious problem with this proposition is that, although it appears that Mr Freeman is the beneficial owner of the business, he has chosen to operate that business through the plaintiff company. There are no doubt numerous advantages to him in doing so, not the least of which is limited liability. Having made that choice, Mr Freeman must accept what flows from it. The plaintiff company is the employer party to the employment agreements with staff. It is only the company which is entitled to the benefit of those agreements and which can enforce them.

[35] A company cannot suffer personal stress and there was no evidence that any stress which might have been experienced by Mr Freeman or other staff resulted in any loss to the plaintiff. More to the point, there was no evidence that, when the employment agreement with Ms Livingston was made, it was contemplated that any loss to the plaintiff might result from stress to staff if she gave less than six weeks' notice.

[36] Overall, I am satisfied that the purpose of the forfeiture clause was to compel Ms Livingston to give six weeks' notice by holding over her the threat of losing wages if she did not comply. As such, it was a penalty provision which, in equity

and good conscience, the Court ought not to allow the plaintiff to enforce. The challenge on this issue is dismissed.

### **Penalty**

[37] The Authority imposed a penalty of \$500 on Ms Livingston for breach of the obligation in her employment agreement to give six weeks' notice of termination. The thrust of Mr McGinn's submissions was directed at the quantum of the penalty which ought to be imposed but, as the plaintiff elected to challenge the whole of the Authority's determination and there was a hearing de novo, I must first consider whether any penalty should be imposed.

[38] There is no doubt that, in giving only two weeks' notice, Ms Livingston breached the terms of the employment agreement. It is equally clear that she knew she was breaching the agreement at the time she tendered her resignation.

[39] [Section 134\(1\)](#) of the Act renders every person who breaches an employment agreement liable to a penalty. That applies equally to employers and employees but it is always a matter of discretion for the Authority, or in this case the Court, whether a penalty should be imposed. Cases in which penalties have been sought and

imposed have been relatively few.<sup>13</sup> In particular, it has been rare indeed for

penalties to be awarded against employees.<sup>14</sup>

[40] The principles to be applied in deciding whether to impose a penalty must be the same as those to be applied in deciding the amount of any penalty which is imposed. After all, a decision not to apply a penalty may also be seen as fixing the

quantum of penalty at zero. On this issue, I agree with the views expressed by Chief

Judge Goddard in *Xu v McIntosh*.<sup>15</sup>

that case, he said:

After citing the penalty provisions applicable to

[47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may

<sup>13</sup> See [Employment Relations Act 2000 commentary, s134 Penalties for breach of employment agreement](#) (online looseleaf ed, WestlawNZ) at [ER134.01].

<sup>14</sup> See *PPP Industries Ltd v Doggett* [1996] 2 ERNZ 234 (EmpT).

<sup>15</sup> *Xu v McIntosh* [2004] NZEmpC 125; [2004] 2 ERNZ 448 (EmpC).

help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement.

Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.

[41] I apply those principles in this case. No harm was done to the plaintiff by Ms Livingston's failure to give six weeks' notice. On the other hand it was deliberate and done in full knowledge of what clause 21.1 of the employment agreement required. In that sense it may be said to have been flagrant.

[42] Given that Ms Livingston was the employee party in this case, it is of only moderate importance to bring home to her that such behaviour is unacceptable. She is unlikely to be in a similar position again in the remainder of her working life. In any event, the experience of having been involved in this litigation will surely have deterred her from ever repeating such conduct.

[43] The issue of general deterrence is of far greater significance. While the strict application of the law of contract is tempered to an extent by the provisions of the [Employment Relations Act 2000](#), employment agreements are very largely formed and applied according to contractual principles. As the Court of Appeal very

succinctly said in *Fuel Espresso Ltd v Hsieh*, "Agreements are made to be kept."<sup>16</sup>

That was said about a restraint of trade provision of an employment agreement but reflects a general proposition which must be respected.

[44] There will be many cases in which employees are tempted to breach the notice requirements of their employment agreements. Where such a breach is prompted by unjustifiable action on the part of the employer, it may be acceptable.

Where the breach is simply for the employee's benefit or convenience and is

<sup>16</sup> *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58, [2007] ERNZ 60 at [21].

contrary to the wishes of the employer, it is conduct which ought to be denounced and deterred.

[45] I find that Ms Livingston's behaviour in breaching the notice provision of her employment agreement was sufficiently egregious that a penalty ought to be imposed. That is solely on the basis of the need for general deterrence of such conduct.

[46] The provisions for recovery of penalties are contained in s 135 of the Act. As originally enacted, this provided for a maximum penalty of \$5,000 for an individual and \$10,000 for a company or other corporation.<sup>17</sup> As an appendix to the decision in *Xu*,<sup>18</sup> there is a table of all penalties imposed by the Authority under s 135 in the period January 2001 to June 2004. This shows that, out of 20 cases in which

penalties had been awarded against individuals, 14 were under \$1,000.

[47] The table in *Xu* does not, however, distinguish between employees and individual employers and, as noted earlier, cases in which penalties have been imposed on employees have been rare. Research suggests there may have been only three or four such cases and the facts of them are very different to this case. In particular, the one determination of the Authority<sup>19</sup> in which a penalty was imposed for breach of the termination provisions of an employment agreement involved very different circumstances. In that case, a doctor engaged on a two year fixed term agreement with no general provision for termination on notice, left on two days

notice after only 2 months, causing the employer more than \$6,000 additional

expenditure. In that case, the Authority imposed a penalty of \$2,000.

[48] There appears to be only one case in which the Court has imposed a penalty for breach of s 134(1). In *Su v iGolf Limited and Zhang*<sup>20</sup> the employer failed to pay a worker salary for a period of one and half years, denying that she was an employee.

Judge Perkins found that she had been employed throughout the period in question

<sup>17</sup> [Employment Relations Act 2000, s 135\(2\)](#) amended by Employment Relations Amendment Act

2010, s 18(1) and s 18(2).

<sup>18</sup> *Xu v McIntosh*, above n 15, at 471.

<sup>19</sup> *Northland Pathology Ltd v Vermeulen* AA25/01.

<sup>20</sup> *Su v iGolf Limited and Zhang* [2015] NZEmpC 56.

and that the employer's actions were so egregious that a penalty of \$5,000 ought to be imposed in addition to orders for payment of money owing to the employee.

[49] Mr McGinn noted that the maximum penalties provided for in s 135 were doubled by the [Employment Relations Amendment Act 2010](#). He submitted that this signalled an intention by Parliament that penalties should be increased from previous levels. There is merit in this submission. In 2003, the maximum penalty for breach of certain provisions of the [Health and Safety in Employment Act 1992](#) was

increased from \$50,000 to \$250,000.<sup>21</sup> In the subsequent leading decision on

penalties under that legislation,<sup>22</sup> a Full Court of the High Court concluded that the five-fold increase in maximum penalties required “A substantial uplift in existing levels of fines”.<sup>23</sup>

[50] Mr McGinn then referred to a decision of the Employment Tribunal under the

[Employment Contracts Act 1991](#), *PPP Industries Ltd v Doggett*.<sup>24</sup>

In that case a

penalty of \$500 was imposed on an employee who left her employment without notice shortly after negotiating an express agreement that she would give two weeks’ notice. Observing that this was 25 percent of the then maximum of \$2,000, Mr McGinn submitted that an appropriate penalty in this case would be \$2,500. Although this submission was made before the decision in *Su*, that case also resulted

in a penalty of 25 percent of the maximum being imposed.

[51] Only a limited amount may be gained from such arithmetic considerations. They can only assist where it can be said that the nature of the breaches required a similar degree of condemnation and punishment. In my view, the gravity of Ms Livingston’s breach in this case was less than that in *Doggett* and very much less than that in *Su*. To the extent that I draw any assistance from these cases, I place less weight on the dated decision of the Employment Tribunal in *Doggett* than I do on the

recent decision of this Court in *Su*.

<sup>21</sup> [Health and Safety in Employment Amendment Act 2002](#), s 24(1).

<sup>22</sup> *Department of Labour v Hanham & Philp Contractors Ltd* [2008] NZHC 2076; (2009) 9 NZELC 93,095 (HC).

<sup>23</sup> At [59].

<sup>24</sup> *PPP Industries Ltd v Doggett*, above n 14.

[52] Having regard to all the circumstances, I find that an appropriate penalty in this case is \$500. In that regard, I agree with the assessment of the Authority.

[53] Where I differ from the Authority is that I order the whole of that sum to be paid to the Court for the benefit of the Crown. As it suffered no loss or injury as a result of the breach, it is not appropriate that any part of the penalty be paid to the plaintiff.

## Conclusion

[54] The plaintiff’s challenge is unsuccessful. The plaintiff is ordered to pay Ms Livingston \$1,943.50, being the sum withheld from her wages. Ms Livingston is ordered to pay a penalty of \$500 to the Court, the whole of which is to be remitted to the Crown.

## Costs

[55] Unless there are arrangements between the parties of which I am unaware, Ms Livingston is entitled to a reasonable contribution to her costs. If the parties are unable to agree, a memorandum should be filed on behalf of Ms Livingston within

30 working days after the date of this decision. The plaintiff is then to have 20

working days in which to respond.

Signed at 9.40am on 24 July 2015

A A Couch  
Judge