IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 200
EMPC 414/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CALEYS LIMITED Plaintiff
AND	TEINA DEADMAN Defendant

Hearing:	1 August 2024 (Heard at Tauranga)
Appearances:	C Pepper, agent for plaintiff Defendant in person
Judgment:	18 October 2024

JUDGMENT OF JUDGE KATHRYN BECK

---

[1] The plaintiff, Caleys Ltd (Caleys), operates a window furnishings business in Tauranga. Teina Deadman was employed by it as a sales and business development representative. The terms of employment were recorded in a written individual employment agreement (IEA). One of the terms of that agreement required Ms Deadman to give one month's notice of termination or, in the alternative, to forfeit a month's salary/wages.

[2] Ms Deadman commenced employment on 14 September 2022 and resigned on 21 November 2022, with an effective date of 22 November 2022.

[3] The plaintiff is seeking to recover from her a portion of one month's salary, being $3,157.67.

[4] The Authority determined that the provision in question was not enforceable because the forfeiture clause was, by its nature, a penalty clause designed to compel performance of the notice period and was not a genuine assessment of liquidated damages.[1] On that basis, it did not uphold the plaintiff's claim.

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

Facts

[6] Ms Deadman applied and was interviewed for the position of sales consultant/business development, having been self-employed for the previous seven years.

[7] She was offered the role by way of a letter of appointment dated 31 August 2022. The employment agreement was subsequently signed on 14 September 2022. Ms Deadman also signed an acknowledgement on 13 September 2022 that she had read and understood the conditions of employment and had sought any required advice and assistance.

[8] Ms Deadman had previously been diagnosed in May 2022 with vertigo. Her doctor had advised her that the symptoms would be temporary. However, in the two weeks between receiving the offer of employment and beginning employment, she suffered a further attack of vertigo. She said she confided in Lisa Pepper, the sales manager, suggesting she should decline the position; she says Mrs Pepper persuaded her not to do so. Mrs Pepper did not give evidence, and so this evidence was not challenged.

[9] It seems that the role was very busy. The work environment required the sharing of an office which was also noisy and busy. While Ms Deadman says she was very familiar with the business of window furnishings, the systems used by Caleys were unfamiliar to her. While there is no suggestion of any formal issues arising in the employment relationship, it seems to be common ground that Ms Deadman was

---

1 *Caleys Ltd v Deadman* [2023] NZERA 598 (Member Tan) at [30].

struggling with some aspects of the role. She says she felt micromanaged and that the work environment was stressful and not conducive to learning new skills.

[10] On 16 and 17 November 2022, Ms Deadman had two days' unpaid sick leave due to the recurrence of vertigo. She says it became apparent to her that the job was not suitable for her; she was exhausted and stressed and did not feel she could do her best for the company.

[11] On 18 November 2022, she met with Cyril Pepper, a director of the company, and advised that she wanted to resign. They discussed her workload, and he suggested that responsibility for one of the company's large clients be removed and that she focus on individual clients. He considered this resolved her concerns. He also reminded her of her obligation to provide one month's notice or to make a payment of one month's salary in lieu. He says Ms Deadman advised that agreements can be changed.

[12] Later that day, Ms Deadman drove the company vehicle to Whakatāne, attended a work appointment, and then spent the weekend in Pikowhai (which is on the way back to Tauranga from Whakatāne), returning early Monday morning. She says she became unwell again over that weekend and decided that she was unable to perform to her full capacity and so she needed to resign.

[13] On the morning of Monday 21 November 2022, she rang Mrs Pepper to advise that she was resigning, with her last day being the following day, Tuesday 22 November 2022. Caleys' evidence is that she was reminded at that point of the requirement to give one month's notice but that she insisted she wanted to leave. Arrangements were made to meet the following day.

[14] Later that afternoon, Ms Deadman emailed the company, advising that "due to unforeseen circumstances with the recurrence of Vertigo", she was resigning, with her last day being 22 November 2022.

[15] On 22 November 2022, Ms Deadman met with Mrs Pepper and handed over her allocated customer files, including 69 allocated customers from the Home Show and other customers. She returned the car and all other company belongings.

[16] Mr Pepper says he also attended this meeting and discussed the requirement to give one month's notice or to pay one month's salary. He says – and Ms Deadman does not disagree – that she did not want to discuss matters further. She says she was simply too tired.

[17] Two weeks later, on 5 December 2022, Mr Pepper wrote to Ms Deadman. The letter notes: "You have elected to terminate without giving one months notice, and in doing so are liable to make payment of [one] months salary in lieu thereof." He stated that Ms Deadman owed Caleys $4,461.52 under the forfeiture provision in the IEA and that her final pay of $1,303.85 had been deducted from the amount owing. He then requested payment of the outstanding sum of $3,157.67. Ms Deadman did not respond or make the payment sought.

[18] On 15 December 2022, Mr Pepper emailed Ms Deadman, advising that no payment had been received and that if the company did not receive payment by close of business on 16 December 2022, it would commence legal action.

[19] Had Ms Deadman provided one month's notice, her last day of work would have been 20 December 2022.

[20] This is a busy period for the window furnishings business. In Ms Deadman's absence, Mr and Mrs Pepper undertook her duties in addition to their own. Both are paid by the company. The company did not pay anything more in relation to these extra duties. Mr Pepper, however, says that in having to undertake Ms Deadman's duties in addition to their own, there would have been lost opportunities for the business. He did not quantify those lost opportunities but referenced their salaries over that period of time, as opposed to Ms Deadman's as a comparator, with the difference being around $7,000.

Issues

[21] The issue for the Court to consider is whether Caleys is entitled to the amount of $3,157.67 from Ms Deadman under the forfeiture clause in the IEA. To determine that issue, it is necessary to determine whether the forfeiture clause is enforceable, or whether it is an unenforceable penalty.

Legal principles

[22] There has been very little law on this issue in the employment jurisdiction since Judge Couch's decision in *GL Freeman Holdings Ltd v Livingston*, despite these clauses being common in employment agreements.[2]

[23] Until recently, the common law in New Zealand distinguished between liquidated damages provisions and penalty provisions. Where a forfeiture clause set out "a genuine covenanted pre-estimate of damage", it was enforceable as a liquidated damages clause; but if it did not, it was deemed a penalty and unenforceable.[3]

[24] However, the Supreme Court revisited and developed the relevant principles in *127 Hobson Street Ltd v Honey Bees Preschool Ltd.* Although it reaffirmed the principle that penalties are not enforceable, it rejected the dichotomy between liquidated damages and penalties.[4] It held that there is a broader category of contractual clauses providing for consequences on breach that are enforceable:[5]

> A contractual clause which provides for consequences on breach may provide for consequences designed to protect the interests of the party in performance of the primary contractual term which has been breached.

[25] The Supreme Court set out the following test for assessing whether a clause stipulating a consequence is an unenforceable penalty:[6]

> A clause stipulating a consequence for breach of a term of the contract will be an unenforceable penalty if the consequence is out of all proportion to the legitimate interests of the innocent party in performance of the primary obligation. A consequence will be out of all proportion if the consequence can fairly be described as exorbitant when compared with the legitimate interests protected.

[26] The assessment of whether a term of a contract is an unenforceable penalty is a question of construction. The terms and circumstances of the contract, including the

---

2 *GL Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120, [2015] ERNZ 833.

3 At [20]–[26]. This approach was derived from Lord Dunedin's decision in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (HL). For a survey of subsequent developments in relevant commonwealth jurisdictions, see *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [2020] 1 NZLR 179 at [39]–[55].

4 *127 Hobson Street*, above n 3, at [57].

5 At [91](c).

6 At [91](a).

contract's broader commercial context, are relevant to the assessment. The assessment takes place as at the time of the contract's formation, rather than as at the time of breach.[7]

[27] For the purposes of the test, the innocent party's legitimate interests in performance and deterring breach may extend beyond "the monetary value of performance" and can include "the broader commercial objectives secured by performance of the principal obligation."[8] Or putting those propositions negatively:[9]

> A party's legitimate interests may extend beyond the loss caused by the breach as measured by a conventional assessment of contractual damages. They may extend to the impact of non-performance on the broader commercial interests the parties seek to achieve or protect through the contract.

[28] Such legitimate interests may "extend beyond the four corners of the contract".[10]

[29] As the Supreme Court found that a party can have a legitimate performance interest beyond the loss caused by breach, it held that it is not always necessary for the court to assess what damages would have been awarded for breach. However, it acknowledged that such an assessment may still sometimes be of assistance:[11]

> … there may be cases where such calculation is the measure of the performance interest. That is likely to be the case where the impugned clause purports to provide a pre-estimate of damage, or where the impugned clause appears in a contract where the only legitimate interest in performance is properly analysed as the monetary value of the losses which flow directly from that breach, and which are readily calculated.

[30] The Supreme Court held that it is not necessary for a clause to be deemed "unconscionable" for it to be unenforceable.[12] However, it noted that whether there is an imbalance of bargaining power can be relevant to a court's application of the test:[13]

---

7 At [59], [76] and [91](b).
8 At [60], [61], [71], and [90](e).
9 At [90](d).
10 At [62]–[66] and [90](d).
11 At [90](g).
12 At [88].
13 At [91](f).

> … where there is evidence of unequal bargaining power, or where one party is not legally advised, a court will scrutinise more closely the innocent party's claims as to the interests protected, and also the issue of proportionality.

[31] In the present case, Mr Pepper noted that Ms Deadman had two weeks to obtain advice prior to signing her employment, and she signed an acknowledgment of that fact, but there is no evidence that she did in fact seek advice. More significantly, the Employment Relations Act 2000 acknowledges the "inherent inequality of power in employment relationships".[14] Therefore, as a general rule, where an employment agreement contains a forfeiture clause, such as that in the present case, the Court will scrutinise any claims closely.

Was the forfeiture provision in the IEA enforceable?

[32] The IEA states: "The engagement shall be terminable by one month's notice in writing from either party, or payment or forfeiture of a months salary/wages in lieu thereof". The question for the Court to consider is whether the consequence stipulated in that clause is out of all proportion to Caleys' legitimate interests in securing performance or deterring breach.

Legitimate performance interests

[33] What then are Caleys' legitimate interests in performance? In exploring that issue, it is helpful to note four types of interests acknowledged as legitimate by the Supreme Court.

[34] First, a contracting party may have a legitimate interest in obtaining the monetary value of performance and avoiding the loss caused by a breach as measured by a conventional assessment of contractual damages. That was the type of interest which was explicitly acknowledged as legitimate by the historical rule.[15]

[35] Secondly, the Supreme Court noted that parties to contracts may have a legitimate interest in securing performance so as to protect "a way or system of conducting business", even where such interests extend beyond "the four corners of

---

14 Employment Relations Act 2000, s 3(a)(ii).
15 *127 Hobson Street,* above n 3, at [60] and [77].

the transaction" regulated by the contract.[16] By way of example, the Supreme Court cited Lord Atkinson's decision in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* where he found that although Dunlop suffered no direct or immediate loss from the resale of tyres below the minimum price stipulated in the agreement, it had a legitimate interest, which it sought to protect by the penalty provision, in preventing "the disorganization of their trading system and the consequent injury to their trade in many directions."[17]

[36] Thirdly, the Supreme Court noted that parties to contracts may have a legitimate interest in the "broader commercial objectives" of "securing the performance of [their] principal obligation" to a third party.[18] As an example, the Supreme Court referred to the decision of Lord Neuberger and Lord Sumption in *ParkingEye Ltd v Beavis*.[19] In that case, ParkingEye oversaw a carpark and charged a fine to any motorist who overstayed two hours. Their Lordships noted that one of the purposes of the fee was ensuring that the parking area was managed efficiently by incentivising performance.[20] The Supreme Court suggested that in considering ParkingEye's obligations to the landowner, their Lordships were acknowledging ParkingEye's legitimate interest in securing the performance of those obligations.[21]

[37] Fourthly, the Supreme Court indicated that parties to contracts may have a legitimate interest in securing performance so as to protect "the future growth prospects" of a business. The Supreme Court was considering a situation where 127 Hobson Street Ltd had agreed to install a lift. The lift was not installed, and a penalty provision applied. The Supreme Court found that Honey Bees Preschool Ltd was "seeking to protect its legitimate interests in operating a business on the premises supported by two lifts, and also seeking to protect the future growth prospects of that business."[22]

---

16 At [63].
17 At [62], citing *Dunlop Pneumatic Tyre Co Ltd*, above n 3, at 92.
18 *127 Hobson Street,* above n 3, at [66].
19 At [64]–[66], citing *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172. *ParkingEye Ltd v Beavis* was consolidated with the *Cavendish* proceedings.
20 *Cavendish Square Holding BV*, above n 19, at [98].
21 *127 Hobson Street*, above n 3, at [66].
22 At [106].

[38] In the present case, Mr Pepper gave evidence on behalf of Caleys as to the purpose of the provision:

> The purpose of the forfeiture clause in the employment agreement is to compensate for the cost that the employer will incur as a direct result of the employee failing to give the required notice.
> …
> The notice period allows the employer time to advertise for a replacement or undertake a restructure so that when the employee finishes there is either a replacement underway or arrangements have been put in place to cover the workload. This is particularly important for a sales and business development role where there are accounts, customer consults and customer relationships involved.

[39] Elsewhere he stated in response to questions about the purpose of the provision:

> That provision is to ensure that we've got a month to advertise and to replace and to make arrangements and more so, because we're a small business, so when Ms Deadman was there, there was one installer, two salespeople, two in the office, two in the factory. So, you'd, like any employer needs that notice period to advertise, to interview and to replace. …

[40] When asked why the provision was enforced, Mr Pepper responded that they were trying to get Ms Deadman to work out her notice period. When asked how Caleys came to the figure of one month's wages for enforcing the forfeiture provision, he stated:

> Because we couldn't, there was business that we couldn't get to do, because we were down one person. Now, a little different if, say Ms Deadman had been incapacitated in hospital or worse, then we would've been faced with, with no option but to walk away from business because we just, a company our size doesn't have the resources to cover that so, and some of those at the Home Show, in particular coupled with it become a busy time of the year, it's a psyche that when daylight saving occurs, from that period up until Christmas and even afterwards, people look at their window furnishings. It is the busiest time of the year and in fact we have an unwritten rule or requirement that no leave is taken between October Labour Weekend and Christmas for that very reason and the fact that we also shut for three weeks. So there would've been business that we could not have fulfilled because we didn't have the resource.

[41] There is limited weight that can be placed on the employer's subjective reasons for enforcement. The Supreme Court held that the assessment of whether a contractual clause is a penalty takes place notionally at the time the contract was formed rather

than at the time of breach.[23] Thus, inconvenience arising as a result of the exact timing and circumstances of the breach is of little relevance. However, the evidence given by Mr Pepper highlights a number of legitimate interests Caleys had in securing performance and, in fact, why many employers would include such provisions.

[42] Caleys' first legitimate interest in performance was to avoid the losses that it would incur as a direct result of Ms Deadman failing to give the required notice.

[43] Its second legitimate interest in performance was to protect its commercial interest in having a reasonable opportunity to recruit a new staff member to replace Ms Deadman before she finished. Where an employer does not have a reasonable opportunity to replace its staff, that can have an impact on its commercial interests in at least three ways:

(a) It makes handover difficult and undermines a business's continuity. As in *Dunlop,* where Dunlop had a legitimate interest in protecting its system of business, employers have a legitimate interest in preserving their businesses' continuity.

(b) It can restrict the opportunities a business can pursue and can undermine the services that are able to be provided to existing customers. As in *127 Hobson Street* and *ParkingEye*, the employer has a legitimate interest in protecting its future growth prospects and its service to customers.

(c) It can place strain on the employer's workforce, particularly where a business is small and does not have resources to cover empty roles. Other employees may need to cover, as occurred in the present case where Mr and Mrs Pepper covered her role. As in *ParkingEye*, employers have a legitimate interest in protecting their positions with their other employees by minimising strain on them.

---

[23] See above at [26].

[44] I accept that the forfeiture clause was designed to protect Caleys' interests in performance of the notice requirement as outlined above. However, it remains to be seen whether the forfeiture clause was proportionate to those interests.

Is the forfeiture clause proportional to Caleys' interests in performance?

[45] Caleys has indicated that one of the purposes of the provision was to compensate for the cost arising as a result of breach. Therefore, as noted by the Supreme Court in *127 Hobson Street*, it may be of assistance to assess what the actual loss was that was caused by the failure to give notice.

[46] In his evidence, Mr Pepper accepted that there had been no express financial cost to the company as a result of Ms Deadman providing only one day's notice. However, he considered that there had been opportunity costs as a result of losing potential customers, or loss to the company as a result of him and Mrs Pepper having to cover her duties.

[47] Although Mr and Mrs Pepper may have worked longer hours as a result of Ms Deadman not providing notice, there is no evidence that they worked 20 additional hours per week as alleged by Mr Pepper in his evidence, and Mr Pepper acknowledged that they were not paid extra for covering Ms Deadman's role. Further, although the company may have lost potential customers as a result of being understaffed, there is no way for the Court to estimate the financial cost to the company.

[48] The fact that assessing the damages arising in the present case is difficult in itself indicates that the forfeiture clause was not a genuine pre-estimate of damage, nor did it represent readily calculable monetary losses flowing directly from the failure to provide notice. Therefore, I do not consider that the provision was proportionate to the losses suffered or that could have been suffered.

[49] Turning to consider Caleys' other legitimate interests in incentivising Ms Deadman to work her notice period, the main problem with each of the interests identified is that they are of limited duration or were negligible in the circumstances.

[50] Although business continuity is important, there is no indication that any extensive handover was required for her role in addition to the handover that occurred on 22 November 2022.[24] The evidence was that Caleys is a small business and that Ms Deadman's role was not performed independently – Mrs Pepper closely monitored her work. Therefore, any prejudice arising from Caleys' continuity being undermined could not have been significant in the circumstances.

[51] Further, Ms Deadman was only required to give one month's notice. Any potential growth that might be lost and any additional strain on a business's employees is therefore limited to that time period. Once that month is over, it is not the employee's responsibility if staff cannot be found to replace them, if the business is not able to maintain its customer relationships, or if other employees are strained.

[52] In this case Caleys chose not to try to replace Ms Deadman straight away. It waited until after the Christmas break; it closed for three weeks in January. It found a replacement in February 2023, and the person began work on 8 March 2023. It was apparent that this approach was guided by the timing of Ms Deadman's resignation (being late November 2022), not whether or not she worked her notice period.

[53] The business continuity interests of Caleys need to be balanced against Ms Deadman's interests in receiving her salary. The forfeiture provision purported to permit Caleys to deduct or claim back an entire month of salary/wages from Ms Deadman. The basic legal right of workers to receive the wages to which they are entitled without deduction is protected by the Wages Protection Act 1983.[25] Unlawful and unreasonable deductions are prohibited.[26] Further, where a worker's entire salary for a month is being deducted or claimed back, that employee will not even receive the minimum wage for work carried out during that month.[27]

[54] Where financial losses are readily calculable and provable, there is no public policy reason limiting an employer from recovering such losses from an ex-employee

---

24 See above at [15].
25 Wages Protection Act 1983, s 4.
26 Sections 5 and 5A.
27 The Court is not being asked to address the lawfulness of deductions in the present case, but deductions which reduce an employee's wages or salary below the minimum wage may be unlawful for the purposes of the Minimum Wage Act 1983.

through a claim for damages. However, where damages are not readily calculable or provable and where the employer's interests in performance are vague and limited in scope, as in the present case, the Court will not readily accept a claim which undermines an employee's right to receive their minimum entitlements.

[55] For the purposes of the present case, I do not accept that the sum of one month's wages claimed under the forfeiture clause is proportionate to Caleys' interests in performance. When compared with any legitimate interests that Caleys might have had in performance, the forfeiture provision is exorbitant.

[56] Accordingly, I am satisfied that the purpose of the forfeiture clause was to compel Ms Deadman to give one month's notice, by holding over her head the threatened punishment of having to pay wages if she did not comply. As such, it was a penalty provision which is unenforceable.

Other issues

[57] These clauses are common in employment agreements, and the wording of this particular IEA provision is fairly standard.

[58] Mr Pepper pointed out to the Court what he considered to be the inequities of the situation. He noted that if the company had given notice and required Ms Deadman to leave immediately, it would have had to pay one month's salary and that as a matter of fairness, it should be the same for her. However, payment is required by the company in those circumstances because, in the absence of serious misconduct, that amount would constitute the sum lost by her. Insofar as the provision benefitted Ms Deadman, it reflected a genuine pre-estimate of damages. Therefore, it would operate as a liquidated damages provision, rather than a penalty provision.

[59] As with most employment relationship problems, each case will turn on its own facts, but the wording of these clauses is often problematic. Had the provision referred to the forfeiture of one month's salary, or the cost or damages incurred by the company as a result of the failure to provide notice, whichever was the lesser, it may well have been enforceable. But in this case, on the evidence before the Court, it

would not have resulted in an order that Ms Deadman pay the sum in question as the company was unable to prove actual loss.

[60] I accept that Ms Deadman was suffering from ill-health at the time as a result of her vertigo, which can have debilitating symptoms. She described herself as being well in between occurrences of her condition but that when an occurrence did happen, she had to lie down and was unable to do anything until it had passed. She had a certificate from her doctor in support of her evidence in this regard.

[61] It was unfortunate, however, that Ms Deadman did not engage with Mr Pepper on 22 November 2022 and explain more fully her circumstances at the time.[28] It is clear that part of the reason for the company's pursuit of this claim was a strong feeling of injustice as a result of her leaving so promptly, in breach of her contractual obligations and with little or no explanation.

[62] In cases such as this, as an alternative to enforcing an unlawful forfeiture clause, an employer could, as it did in *GL Freeman Holdings Ltd v Livingston*, seek penalties for a breach of the employment agreement.[29] Such a claim needs to be lodged within one year of the action arising in relation to the breach.[30] It could also seek damages for breach of contract. Accordingly, this is not a situation where there are no remedies available to an employer. However, the company did not bring such a claim in this instance.

[63] On the evidence before the Court, it appears that Caleys made a deduction of $1,303.85 from Ms Deadman's final pay in reliance on the forfeiture provision. As that forfeiture provision was unenforceable, that deduction was unlawful.[31] There is also no indication that Ms Deadman was meaningfully consulted on the deduction prior to it being made, which is also unlawful.[32] That sum ought to be repaid. Ms

---

28 Ms Deadman had an obligation under s 4(1A)(b) of the Employment Relations Act to be responsive and communicative.

29 Employment Relations Act, s 134.

30 Section 135(5).

31 Wages Protection Act, s 5(1) and 5A. See also *Labour Inspector v Prisha's Hospitality (2017) Ltd* [2023] NZEmpC 89, [2023] ERNZ 349 at [121].

32 Wages Protection Act, s 5(1A).

Deadman has not made a claim of her own, but if she wished to enforce the matter, she could do so in the Authority.

Outcome

[64] The plaintiff's challenge is unsuccessful.

[65] Ms Deadman is not required to pay Caleys the amount sought.

[66] Both parties were self-represented, and so there is no issue as to costs.

Kathryn Beck
Judge

Judgment signed at 3.15 pm on 18 October 2024