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G L Freeman Holdings Limited v Livingstone [2013] NZEmpC 151 (13 August 2013)

Last Updated: 23 August 2013

IN THE EMPLOYMENT COURT CHRISTCHURCH REGISTRY

[\[2013\] NZEmpC 151](#)

CRC 29/13

IN THE MATTER OF an application for an extension of time to file a challenge to a determination of the Employment Relations Authority

BETWEEN G L FREEMAN HOLDINGS LIMITED Applicant

AND DIANE LIVINGSTONE Respondent

Hearing: on the papers - memoranda received 18 June and 26 July 2013. Appearances: Tim McGinn, counsel for the applicant

Robert Thompson, advocate for the respondent

Judgment: 13 August 2013

JUDGMENT OF JUDGE A A COUCH

[1] This decision deals with an unopposed application to extend time for filing a challenge to a determination of the Employment Relations Authority (the Authority).

[2] The employment relationship problem investigated by the Authority involved a claim by the respondent for holiday pay which the applicant had withheld in reliance on a term of their employment agreement which provided that certain payments be forfeited if insufficient notice of resignation was given. In its determination^[1], the Authority found that the forfeiture was a penalty and unenforceable. It ordered the applicant to pay the arrears of pay sought but imposed

a statutory penalty on the respondent for breach of the employment agreement.

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[3] The applicant was dissatisfied with the Authority's determination and resolved to challenge it pursuant to [s 179](#) of the [Employment Relations Act 2000](#). To pursue such a challenge as of right, a statement of claim had to be filed within 28 days after the date of the determination. As the determination was dated 16 May

2013, that meant the final day for filing was 13 June 2013.

[4] Instructions to prepare a statement of claim and file it were given to counsel for the applicant in good time but he failed to file it within the time allowed. Realising that, he filed the current application, together with a memorandum in support and a draft statement of claim on 18 June 2013. That was five days after the time prescribed by [s 179\(2\)](#) had expired.

[5] The application is not opposed by the respondent but that, of itself, does not mean that the application should be granted. I must be satisfied on the information before me that it is in the interests of justice to do so.

[6] The reasons for the delay are addressed in Mr McGinn's memorandum. He acknowledges that he was well aware of the statutory time limits involved. He says that he inexplicably failed to note the critical date in his diary and, at the time when the statement of claim ought to have been filed, he was heavily engaged with other business, including preparation for the

hearing of a particularly complex case.

[7] The delay in this case was moderate and was the result of an error by counsel rather than tardiness on the part of the applicant. When Mr McGinn realised that he had missed the time limit, he acted promptly and appropriately by filing the current application and supporting documentation.

[8] Mr McGinn notified Mr Thompson on 17 June 2013 that the current application would be made and there is no suggestion that the respondent has been prejudiced by the delay.

[9] As to the likely merits of the challenge, the first aspect of the proposed case for the applicant is that the Authority erred in regarding the forfeiture provision of the employment agreement as a penalty rather than as liquidated damages. On the evidence before the Authority, this is arguable. Mr McGinn also suggests that a decision of the Court in this case may have wider application as many employment agreements contain provisions for forfeiture or payment where insufficient notice of termination is given. That may well be so.

[10] The second aspect of the proposed case for the applicant is that the penalty imposed on the respondent by the Authority for breach of the employment agreement was insufficient in light of the 2011 amendment to the [Employment Relations Act 2000](#) doubling the maximum penalty available. This is also arguable.

[11] Overall, I find that it is in the interests of justice to grant the extension of time sought.

[12] The applicant must now pay the filing fee for a statement of claim. That fee must be paid within 10 working days after the date of this judgment or the extension of time granted will no longer apply. When payment is made, the draft statement of claim filed with the current application shall be regarded as the statement of claim and should be served in the usual way.

[13] Costs are reserved.

Signed at 11.00 am on 13 August 2013.

A A Couch
Judge

[\[1\]](#) [2013] NZERA Christchurch 90.

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