IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 52
5534987

	BETWEEN	LAUREL FAY McDONALD Applicant
	A N D	G.L. FREEMAN HOLDINGS LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Cahill, Advocate for the Applicant Liz Grenfell and Elfrieda McCalum, Advocates for the Respondent
Investigation Meeting:	26 March 2015 at Christchurch
Date of Determination:	23 April 2015

DETERMINATION OF THE AUTHORITY

A **Clause 12.1 of the employment agreement is a penalty provision and is not enforceable.**

B **G.L. Freeman Holdings Limited is ordered to pay to Laurel McDonald the sum of $1,047.40 gross holiday pay.**

C **G.L. Freeman Holdings Limited is ordered to pay to Laurel McDonald interest at the rate of 5% from 17 November 2014 until the date of payment.**

D **G.L. Freeman Holdings Limited is ordered to pay to Laurel McDonald costs in the sum of $583.33 together with reimbursement of the filing fee of $71.56.**

Employment relationship problem

[1] Laurel McDonald was employed from 30 September 2013 at the Redwood Hotel, Christchurch as a cleaner/housekeeper. The Redwood Hotel was, until recently, owned and operated by G.L. Freeman Holdings Limited (G.L. Freeman).

[2] Ms McDonald signed a written employment agreement with G.L. Freeman on 28 September 2013. The employment agreement provided in clause 12.1 as follows:

> *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.*

[3] Clause 5.4 provides as follows:

> *5.4 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.*

[4] On 7 November 2014, Ms McDonald provided written notice of her resignation as she had obtained another position. She stated in her resignation letter that she had obtained full time employment that commenced on 17 November 2014. Ms McDonald gave eight days' notice.

[5] There was no payment to Ms McDonald for holiday pay. She claims payment of her holiday pay entitlement in full in the sum of $1,047.40 gross, interest on holiday pay until it is paid and costs.

[6] G.L. Freeman say Ms McDonald had forfeited her holiday pay due to a lack of notice. It relied on the giving of eight days' notice when the contract required six weeks' notice.

[7] The sole director and shareholder of G.L. Freeman, Gordon Freeman, was unable to attend the investigation meeting. He arranged for the company to be represented by Liz Grenfell and Elfrieda McCalum who had held administration

positions with G.L. Freeman previously. They did not give any evidence in this matter.

The issues

[8] The issue before the Authority is whether the provision in clause 12.1 for the forfeiture of holiday pay or wages is enforceable. The provision cannot be enforced if the effect of it is to penalise the party who is in breach.

[9] The Authority has considered in two earlier cases whether the provision in clause 12.1 of the employment agreement is an enforceable provision[1]. The first of those cases is currently awaiting judgment following a challenge to the Employment Court. The second case also concerned a cleaner. In both cases, findings were made that clause 12.1 was a penalty provision and orders were made that there should be reimbursement of forfeited sums for holiday pay and in *Paengkam* a sum for unpaid wages.

Is the provision in clause 12.1 of the employment agreement enforceable?

[10] As was stated in *Livingston*, parties to an employment agreement are allowed to make an assessment of potential loss at the time they enter into an agreement and that can sensibly avoid the difficulty later of proving such loss. To be enforceable the provision must be a genuine forecast of probable loss in the event of breach and cannot be a provision used to force an employee to perform the agreement by holding a threat over his or her head. If it is of the later nature then it is a penalty and not enforceable.

[11] Whether a sum stipulated in an employment agreement is a penalty or a genuine attempt to estimate damages is to be decided with regard to the particular employment agreement at the time the agreement was entered into and not at the time of the breach - *Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd*.[2]

[12] The Authority did not hear any evidence as to why the particular provision had been included in the employment agreement with Ms McDonald. Ms McDonald did not work full time hours at the Redwood Hotel. Her evidence was that towards the end of her employment with G.L. Freeman her hours were reducing and she wanted a

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1 *Diane Livingston v. G.L. Freeman Holdings Ltd* [2013] NZERA Christchurch 90; and *Naritha Paengkam v. G.L. Freeman Holdings Ltd* [2013] NZERA Christchurch 235

2 [1915] AC79 (HL)

position with more hours. Her hours throughout her employment varied. At the start of her employment Ms McDonald was rostered on Saturday, Sunday, Monday and Tuesday. After a while, Ms McDonald was required to telephone in on other days at 8am to see if she was required to work. If the number of rooms to clean was higher than normal, then she may be asked to help out. Ms McDonald said she was happy to go in if extra help was required because that meant she could work more hours.

[13] The Authority has a report of the hours that Ms McDonald worked while employed by G.L. Freeman. I have calculated that for the first six months of her employment from 30 September 2013 to 30 March 2014 (26 weeks), Ms McDonald's hours averaged 17.18 per week. For her final months from June 2014 to 16 November 2014 (25 weeks), her hours averaged 12.85 per week.

[14] In her evidence, Ms McDonald said that at the time that she resigned there were four cleaners and there was nothing to support that finding a replacement cleaner or increasing the hours of another cleaner was difficult. I find that consideration should be had to the fact that because the hours were limited per week, they could have been spread amongst the remaining cleaners for a period before a new cleaner was employed.

[15] In *Dunlop*, it was held that the sum is a penalty if it is extravagant and unconscionable in comparison with the greatest loss that could possibly follow from the breach. In this case, at the time the employment agreement was entered into, the nature of the role and the limited hours that would be provided was known in advance. Any genuine pre-estimation of a loss would have to account for the fact that Ms McDonald if in breach of her notice provision could in all likelihood have had her hours re-allocated amongst the existing cleaning staff until and if a new cleaner was found.

[16] I am not satisfied that the greatest loss which could possibly follow from the breach is equivalent to one week's wages or holiday pay for each week notice is short up to six weeks. The forfeiture provision, I find, is out of proportion and extravagant when compared with any likely loss arising from the breach.

[17] I find in conclusion that the forfeiture provision in clause 12.1 of the employment agreement is not enforceable because it is in the nature of a penalty to compel performance rather than a genuine assessment of liquidated damages.

[18] The holiday pay forfeited is to be reimbursed.

Holiday pay

[19] There was no issue taken on behalf of G.L. Freeman about the quantum of holiday pay that was withheld.

[20] I order G.L. Freeman Limited to pay to Laurel McDonald the sum of $1,047.40 gross being holiday pay.

Interest

[21] I find that Ms McDonald is entitled to interest on the holiday pay that was withheld from her. It appeared from the report on hours that wages were paid for the week ending Sunday evening. On that basis, I have assessed interest on holiday pay to be payable from 17 November 2014 until the date of payment at the rate of 5% per annum in accordance with clause 11 of Schedule 2 to the Employment Relations Act 2000 under s.83(3) of the Judicature Act 1908. To assist the parties from 17 November 2014 to and including the date of this determination, 23 April 2015, that is 158 days with a rate of interest at 14 cents per day.

Costs

[22] Mr Cahill provided the Authority with an invoice that had been issued to Ms McDonald in the sum of $2,203.38 GST inclusive. He acknowledged that the investigation meeting was less than the sum claimed which was for four hours.

[23] Costs in the Authority are usually determined on the basis of a daily tariff which is $3,500. This investigation meeting took just over half an hour. The daily tariff includes preparation and attendance at the investigation meeting. On the basis of the daily tariff, it is very unusual in the Authority for a full award of costs to be made. It has been recognised by the Employment Court that the Authority operates at a low level and cost awards are usually modest.

[24] In all the circumstances, I have assessed the daily rate on the usual hearing day of six hours and consider it would be fair to make an award for $583.33 being one sixth of the usual daily tariff.

[25] I order G.L. Freeman Holdings Limited to pay to Laurel McDonald costs in the sum of $583.33 together with reimbursement of the filing fee of $71.56.

Helen Doyle
Member of the Employment Relations Authority