Employment Court of New Zealand

Nicholson v Ford [2018] NZEmpC 132 (12 November 2018)

Last Updated: 16 November 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 132
EMPC 82/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALLAN DANIEL NICHOLSON Plaintiff
AND	MATTHEW FORD Defendant

Hearing:	17 August 2018 (Heard at Hamilton)
Appearances:	D Hayes, counsel for plaintiff T Braun and JE Smith, counsel for defendant
Judgment:	12 November 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] This challenge arises out of a determination of the Employment Relations Authority imposing a penalty on Allan Nicholson for instigating, aiding and/or abetting breaches of Matthew Ford's terms of employment.1 The breaches relate to alleged procedural and substantive deficiencies in respect of Mr Ford's dismissal for redundancy. Mr Nicholson is director, chief executive and shareholder of the company which employed Mr Ford. Mr Nicholson drove the redundancy process from start to finish, and was intimately involved with each step leading up to Mr Ford's dismissal.

[2] Normally the matter would come before the employment institutions as a personal grievance claim. That option was not available to Mr Ford because the

1 *Ford v New Zealand Dental Partners Ltd Partnership (in liq) t/a Clinico Denture and Hearing* [2018] NZERA Auckland 68.

company was placed in voluntary liquidation before the matter could progress in the Authority. The liquidator did not consent to the continuation of the claim against the company and its parent company. Mr Ford could have proceeded down the route of applying to the High Court for orders enabling him to proceed against the company in liquidation but he chose to pursue a claim against Mr Nicholson for a penalty under s 134 of the Employment Relations Act 2000 (the Act) for instigating, aiding and/or abetting breach of his employment agreement.

[3] The case raises issues as to the approach to imposing penalties against individuals in such circumstances, and

appropriate quantum.

Instigating, aiding and/or abetting breach?

[4] During the course of closing submissions Mr Hayes, counsel for the plaintiff, conceded that Mr Nicholson's actions fell within the ambit of s 134, that Mr Ford's employment agreement had been breached and that the dismissal for redundancy was procedurally and substantively unjustified. That was a proper concession to make, given the way in which the evidence came out at hearing, and reflects the earlier findings of the Authority.

[5] Despite the plaintiff's concession, it is necessary to outline the key facts. Mr Ford was an accounts administrator (a relatively junior position) with the company and had been for around two years. Mr Nicholson wished to restructure the company. His attention was focused on the accounts department. Three people worked in that department – Mr Ford, Mr Ford's manager and Mr Nicholson's wife. Mr Ford's manager decided to resign prior to the conclusion of the restructuring process. Mr Nicholson did not consider that restructuring his wife's position was appropriate, and immediately discounted it as a possible option. That left Mr Ford's position. Mr Ford was concerned about the proposal, and what underlay it. He requested further information. Despite the fact that Mr Nicholson repeatedly said that there were good economic reasons for proceeding down the restructuring route, very little information (other than a scant summary of the company's profit and losses for the year to date) was ever provided.

[6] Prior to giving notice of termination, Mr Nicholson sought to discuss matters with Mr Ford and his (then) representative. Mr Nicholson clearly would have preferred to have reached a negotiated resolution with Mr Ford directly, and thought that such an agreement had been reached following a meeting with the representative. When Mr Ford later clarified that he was not interested in agreeing to a departure on the terms proposed by Mr Nicholson, and confirmed that he wished to comment on the proposal (and required access to financial information to enable him to do so), Mr Nicholson became frustrated. Rather than providing Mr Ford with the requested information, Mr Nicholson became belligerent, combative and unresponsive. This is most graphically seen in his subsequent communications with Mr Ford's legal counsel, who renewed requests for relevant information on Mr Ford's behalf.

[7] Mr Nicholson regarded counsel's requests as a mechanism for seeking to extract money out of the company, an outcome that Mr Nicholson was determined to avoid. This led him to threaten Mr Ford with legal proceedings. In an email sent by Mr Nicholson to Mr Braun, counsel for Mr Ford, dated 1 March 2017, Mr Nicholson stated:

I am required to put both yourself and [Mr Ford] on notice we are now taking advice regarding seeking costs from your client for the following:

- Hurt and humiliation caused to both myself and my wife during this process.

- Legal costs and advice incurred.

- Stress caused to both myself and my wife, verified by medical experts.

[8] I pause to note that during the course of evidence Mr Nicholson posed the rhetorical question as to why it was fair that an employee could pursue a claim for stress against an employer in the circumstances of the present case, but an employer could not raise a similar claim against an employee. In the context of this case, the answer is self-evident. While it was no doubt irritating to Mr Nicholson to be asked for financial information underpinning his assertions that the company needed to restructure, it is well established that an employer is required to provide relevant information, whether they like it or not. The requests for additional information made on Mr Ford's behalf were, without exception, advanced in moderate language, were reasonable on their face, and sought nothing more than that to which Mr Ford was

entitled under the law. Mr Nicholson was well aware of the terms on which Mr Ford was employed and deliberately set about to undermine them.2 Mr Nicholson was responsible for the failure of the company to act as a fair and reasonable employer, breaching the obligations of good faith in the way in which Mr Ford was dealt with, including by threatening legal proceedings against Mr Ford who was, by that stage, on sick leave recommended by his doctor (as Mr Nicholson knew) and was suffering health problems caused by stress.

[9] Mr Nicholson is liable for a penalty.

Appropriate to order a penalty against Mr Nicholson?

[10] Mr Hayes submitted that a penalty was not appropriate in circumstances where the employer has simply made a mistake in respect of their obligations in a restructuring situation. That particular issue does not arise in the present case. I do not accept that the breach can properly be characterised as a simple mistake. Rather, the process Mr Nicholson adopted

in respect of his dealings with Mr Ford on behalf of the company throughout the restructuring process was deliberate, obstructive, threatening and bullying.

[11] Nor do I accept that imposing a penalty against the 'last man standing' (namely in circumstances where the company has gone into liquidation) would open the floodgates as Mr Hayes contends. He submitted that such a finding would expose lawyers, accountants, human resources officers, chief executives, and a raft of other people who had had some minor input into a flawed restructuring process, to a potential penalty.

[12] The relevant legislative provision places constraints around the exercise of the Court's discretion in determining an appropriate penalty for a breach. There may be circumstances where a penalty for an established beach is not appropriate. The matters to be taken into consideration by the Court include, but are not limited to, the nature and extent of the breach, or involvement in the breach; whether the breach was

2. See *Aarts v Barnardos New Zealand* [2013] NZEmpC 85 at [32], citing *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 (EmpC) at [75]-[76].

intentional, inadvertent, or negligent; and the circumstances in which the breach, or involvement in the breach, took place. The floodgates argument does not provide a principled basis for declining to impose a penalty against a person involved in, for example, a restructuring process. That is for the simple reason that Parliament has made it clear that there will be cases where it is appropriate that a penalty be imposed on those complicit in a breach. The extent to which the gate is opened is controlled by the discretionary factors Parliament has provided for, and which the Court must apply.

[13] While this challenge has proceeded on a de novo basis, and I have heard the evidence afresh, it was essentially agreed that the evidence had emerged in a similar way as it had in the Authority. I agree with, and adopt, the Authority Member's overarching assessment that:

[23] A penalty is warranted because of the way in which Mr Nicholson exercised his power as chief executive and decision maker in carrying out the redundancy process in breach of the terms of employment, including the good faith obligations regarding fair consultation and provision of information, of a junior staff member.

Quantum of penalty

[14] The starting point in the penalty-setting exercise is the Act.

[15] The Act sets out the breaches which can give rise to the imposition of a penalty (namely breach of an employment agreement or breach of any provision of the Act for which a penalty in the Authority is provided in the particular circumstances).3 Having decided that a breach/breaches have occurred, the Court is then required under the Act to have regard to numerous mandatory considerations in determining the amount of penalty to impose. In this regard s 133A provides:

3 Employment Relations Act 2000, s 133.

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

(a) the object stated in section 3; and
(b) the nature and extent of the breach or involvement in the breach; and
(c) whether the breach was intentional, inadvertent, or negligent; and
(d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
(e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
(f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
(g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[16] As will be apparent, s 133A expressly identifies seven mandatory statutory considerations to which the Court must have regard when determining the amount of penalty to impose in relation to an established breach. As the provision makes clear, there may be other factors which will be relevant in a particular case. If they are relevant, the Court is required to have regard to them ("the Authority or court (as the case may be) *must* have regard to all relevant matters, *including*– [the seven listed considerations].")

[17] A full Court considered the application of s 133A in *Boorsboom v Preet PVT Ltd*.4 While *Preet* was dealing with multiple breaches of minimum entitlements, it nevertheless provides more general guidance in terms of the penalty assessment process.5 In addition to the seven statutory mandatory considerations set out in the provision itself, the Court identified four additional considerations which it said "need to be assessed by the Authority and the Court in determining whether a penalty should be imposed and, if so, be reflected in that penalty."6 The full Court also identified what appears to be a fifth consideration when setting out its guideline four-step

4 *Boorsboom v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072.

5 At [72].

6 At [68].

process, namely the need to have regard to financial capacity when considering proportionality at the final step of the process.7

[18] Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):

1. The object stated in s 3 of the Act (mandatory statutory consideration 1);
2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);
7. previous conduct (mandatory statutory consideration 7);

7 At [146], [151].

8. deterrence, both particular and general (*Preet* additional mandatory consideration 1);
9. culpability (*Preet* additional mandatory consideration 2);
10. consistency of penalty awards in similar cases (*Preet* additional mandatory consideration 3);
11. ability to pay (*Preet* additional mandatory consideration 4); and
12. proportionality of outcome to breach (*Preet* additional mandatory consideration 5).

[19] As I have said, *Preet* (which involved a complex factual matrix, with multiple breaches across multiple Acts; multiple employees and multiple employers) set out a four-step process which the Court indicated might usefully be applied in penalty- setting cases. The four-step process identified by the Court is:8

Step 1 - the number and nature of the breaches. I read *Preet* Step 1 as involving four sub-steps:

1. identify the number of breaches;
2. identify the nature of each breach (for example, a breach under the Holidays Act; Minimum Wages Act etc);
3. identify the maximum penalty for each of the identified breaches; and
4. consider whether "global" penalties should apply ("globalisation" might be considered at this stage and "at all or at some stages of this stepped approach").

8 At [151].

Step 2 – establish a provisional starting point by assessing the severity of the breach in each case. Consider both aggravating and mitigating features.

Step 3 – consider the means and ability of the person in breach to pay the provisional penalty arrived at in step 2.

Step 4 – apply the proportionality or totality test to ensure that the amount of each final penalty is just in all of the circumstances. This, the Court said, required standing back and assessing whether the final penalty was proportionate to the original amount in issue and whether the final penalty was likely to be paid, if ordered against the employer. I note that care will need to be taken to avoid double-discounting on the basis of financial capacity at steps 3 and 4.

What is the number of breaches for penalty-setting purposes in this case?

[20] Applying *Preet*, the answer to the question as to the number of breaches will depend on whether the breaches are to be

regarded as separate or indivisible for penalty purposes. So:

> (a) Breaches of different statutory provisions in different Acts (such as unpaid holidays entitlements, breach of the minimum wage, and the failure to provide a written employment agreement) comprise separate breaches, falling into the former (separate breaches) category.9
> (b) Materially identical breaches of a regularly repeated nature against each affected employee (such as ongoing failure to pay the minimum wage) fall into the second category (indivisible breaches) and give rise to a single penalty in respect of each separate employee affected.10 (I observe that this effectively reduces the maximum penalty threshold that might otherwise be available and may, if too rigorously applied,

9 At [154].

10 At [155].

lead to an artificially low penalty, depending on the particular circumstances).

> (c) Breaches of different provisions of one Act might fall within the indivisible breach category, depending on whether such breaches were sufficiently "interrelated" that it is appropriate to deal with them as one breach (again, this effectively reduces the maximum penalty threshold that might otherwise be available). Breaches of different sections of the Holidays Act relating to working on and being paid for public holidays were viewed in *Preet* as giving rise to one breach.11

[21] Was there one breach or multiple breaches in this case?

[22] During the course of the hearing counsel for the defendant pointed out that while the claim had been pleaded as a single breach in the Authority, in reality there were several breaches committed throughout the process (such as the ongoing procedural and other deficiencies in the restructuring process, the breaches of good faith, the failure to consult adequately, and the failure to provide requested information). If there were multiple breaches that might, of course, support multiple penalties, thereby presenting further latitude in terms of the maximum penalty available (namely $10,000 per breach).

[23] In *Preet* the Court made the point that Parliament had not legislated expressly for a "single course of conduct assessment".12 The Court did however refer to the approach adopted in Australia in *Fairwork Ombudsman v EA Fuller & Sons Pty Ltd.*13 In *EA Fuller & Sons* the Court held that if a number of breaches are part of an ongoing course of conduct by one person, they are to be treated as "a single course of conduct" for penalty purposes.14 This approach appears to underlie the full Court's "global penalty" approach to multiple breaches (what I refer to as "indivisible breach"), to the extent that breaches of the same Act was involved. The *Preet* Court made it clear that it would not apply such an approach where multiple breaches of separate Acts were in issue.15

11 At [157].

12 At [107].

13 *Fairwork Ombudsman v EA Fuller & Sons Pty Ltd* [2013] FCCA 5 at [22]- [27].

14 At [24].

15 *Preet*, above n 4, at [139].

[24] The circumstances of this case are quite different from the factual context the full Court was concerned with in *Preet*, and are readily distinguishable from cases involving, for example, different breaches of different employment standards over time,16 or breaches of the same nature but relating to different employees.17

[25] While it is conceptually possible to analyse the sequence of events in the present case as giving rise to individual breaches, I agree with Mr Braun that the breach (which arose during the course of a restructuring process) is more sensibly regarded as an ongoing breach. That will not always be the outcome in cases involving multiple breaches of an employment agreement. Ultimately a case-specific approach will always be required.

[26] I conclude that there was one breach for penalty-setting purposes.

Mandatory statutory consideration 1: the object stated in s 3

[27] The circumstances of this case reinforce the need to promote the obligations of good faith and mutual trust and confidence, particularly in light of the way in which Mr Nicholson's actions during the course of the restructuring process (in which there was a significant imbalance of power) undermined each of these obligations and the relevant statutory objective.

Mandatory statutory consideration 2: the nature and extent of the breach or involvement in the breach

[28] Mr Nicholson was in the driver's seat as far as the breach was concerned. He drove the process and was intimately involved in and responsible for the deficiencies relating to it. The process was significantly flawed and Mr Nicholson brought a bullish and threatening approach to bear. The course of conduct was one characterised by its relentless path to the ultimate goal, namely securing Mr Ford's departure from the company, including in circumstances where Mr Nicholson knew that Mr Ford was unwell.

16 See, for example, *O'Shea v Pekanga O Te Awa Farms Ltd* [2016] NZEmpC 19 at [57], cited in

Preet at [69].

17. In *Preet* the Court was dealing with actions by the Labour Inspector with regard to five former employees, and involving breaches of three different Acts.

Mandatory statutory consideration 3: whether Mr Nicholson's breach was intentional, inadvertent or negligent

[29] The breach was intentional. Mr Nicholson said that he sought, received and followed legal advice, but the details of the advice were not before the Court. In these circumstances, issues that might otherwise arise in relation to reliance on a professional adviser's advice do not need to be dealt with.

Mandatory statutory consideration 4: the nature and extent of any loss or damage suffered by Mr Ford or gains made or losses avoided by Mr Nicholson because of the breach or involvement in the breach

[30] Mr Ford suffered a significant decline in his health, including stress and anxiety. His confidence was undermined and, until recently, he has been unable to find alternative work, in part because of the physical and mental impact he has suffered.

[31] Mr Ford lost the opportunity to fully participate in the restructuring process. Through the breach Mr Nicholson was able to restructure Mr Ford's role out of existence, thereby avoiding the ongoing costs of employment.

Mandatory statutory consideration 5: whether Mr Nicholson has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach

[32] There is no evidence before the Court that Mr Nicholson has done anything to avoid or mitigate the adverse effects of the breach. I agree with and adopt the Authority Member's observation that:

[27] Mr Nicholson has not compensated Mr Ford or otherwise mitigated the consequences on him of those breaches in any other way. Neither, due to the liquidation of the partnership and the company, does Mr Ford have the prospect of any compensation or other mitigation of those breaches. There was no risk of Mr Nicholson, either directly or indirectly, being doubly penalised for the same actions.

Mandatory statutory consideration 6: the circumstances in which the breach, or involvement in the breach, took place, including Mr Ford's vulnerability

[33] The breach occurred over a reasonably extensive period of time and, as I have said, had multiple elements to it. Mr Ford was in a relatively junior position. He was

unwell, as Mr Nicholson knew. Mr Nicholson was in a position of power. Mr Ford was unable to access relevant information he sought without Mr Nicholson's assistance, which Mr Nicholson refused to provide, despite the engagement of a lawyer.

Mandatory statutory consideration 7: whether Mr Nicholson has previously been found in proceedings under the Act or any other enactment, to have engaged in similar conduct

[34] There is no evidence to suggest that Mr Nicholson has been found to have engaged in similar conduct in the past.

Preet additional mandatory consideration 1: deterrence, having regard to the particular person to be penalised and the wider community of employers

[35] While there is nothing to suggest that Mr Nicholson has previously engaged in similar conduct, there is an obvious need to bring home to him the standards he is required to meet as an employer and to make it plain, both to him and other

employers who may be tempted to short-circuit the basic requirements relating to restructuring exercises, that there are risks in doing so.

Preet additional mandatory consideration 2: degree of culpability

[36] I have already had regard to this factor in considering the seriousness of the breach and the nature and extent of Mr Nicholson's involvement in it (under considerations 2 and 3 above).

Preet additional mandatory consideration 3: the general desirability of consistency in decisions on penalties

[37] Counsel were unable to identify any cases (other than this one) in which a penalty has been imposed by the Court for aiding, abetting and/or inciting a breach of an employment agreement.18 There are, however, cases in which a penalty has been imposed for breach of an employment agreement. I do not consider that the fact that

18 But see the recent judgment of *A Labour Inspector v Prabh Ltd* [2018] NZEmpC 110, decided under Part 9A, where two defendant directors were persons "involved in a breach" as defined in s 142W, and had penalties awarded against them of $16,000 each.

the breaches in this case fall into the former, rather than the latter, category is materially relevant to the quantification exercise. Both categories of case engage the same sorts of factors and both require careful consideration of the individual facts and circumstances of the particular breach. Further, the breach in this case is more akin to those cases dealing with breach of good faith and breach of an employment agreement than to cases finding breaches of minimum entitlements. The following give an indication of the range of penalty awards for breach of good faith which have been emerging from the Authority:19

(a) $5,000 in *Franich v Vodafone New Zealand Ltd* for deliberate inadequate consultation over a restructuring proposal;20

(b) $2,500 in *Murray v South Pacific Meats* for a failure to respond to the employee's concerns, with the intention of undermining the employment relationship;21

(c) $4,000 in *Curry v ISS Holdings Ltd* in a "serious" case involving a predetermined restructuring procedure undermining the employment relationship;22

(d) $2,500 in *Nee v Best Health Products Ltd* for failure to engage adequately in response to continuing requests for wage and time records;23

(e) $5,000 in *Newman v Solid Roofing Ltd* for a single failure to provide wage and time records in response to a request;24

19 Note that a penalty may be imposed for a breach of the duty of good faith under s 4A of the Act. A threshold must be met before a penalty can be imposed, for example that the failure to comply with good faith was "deliberate, serious, and sustained." This can be contrasted to s 133A, under which no threshold exists. It is unclear what, if any, impact the varying thresholds for imposition of a penalty might have.

20 *Franich v Vodafone New Zealand Ltd* [2016] NZERA Auckland 7.

21 *Murray v South Pacific Meats Ltd* [2016] NZERA Christchurch 59.

22 *Curry v ISS Holdings Ltd* [2015] NZERA Christchurch 152.

23 *Nee v Best Health Products Ltd* [2015] NZERA Christchurch 84.

24 *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 214.

(f) $500 in *Manganda v Waikato Ethnic Family Services Trust* for failing to respond to an employee's concerns and personal grievance;25

(g) $1,000 in *Ball v Battersea Investments Ltd* for failure to be communicative and responsive (and reduced through consideration of ability to pay).26

[38] None of the above cases is on all fours with this case. *Franich* bears some similarities having regard to the ongoing nature of the employer's default. The present case has some aggravating factors which appear to be absent from the most of the cases. And *Newman*, in which a penalty of $5,000 was imposed, involved a single instance of failing to respond to a request. Relevant features of the present case place it in the higher end of the range of awards made in analogous cases.

Preet additional mandatory consideration 4: ability to pay

[39] There is nothing to suggest that financial capacity is an issue in this case.

Preet additional mandatory consideration 5: is the anticipated outcome proportionate to the breach or breaches for which the penalty is imposed?

[40] The Authority awarded a penalty for the total amount claimed, namely

$10,000. That is the maximum penalty in the Act in relation to one breach, although the Authority approached the issue on the basis that there were separate breaches effectively amounting to "multiple related breaches", to which it applied one global penalty.27 I have taken a different view of the one breach/multiple breaches point, for reasons I have already referred to. I agree with Mr Hayes that this was not a case at the most serious end, warranting the imposition of the highest penalty available. It does however invite a stern response.

[41] Having regard to the relevant factors identified above, I would assess an appropriate penalty as being $7,500. I have considered whether such an amount would

25 *Manganda v Waikato Ethnic Family Services Trust* [2018] NZERA Auckland 206.

26 *Ball v Battersea Investments Ltd* [2018] NZERA Christchurch 78.

27 *Ford*, above n 1, at [24].

be proportionate to the breach itself and am satisfied that it would be, including because of the ongoing nature of the breach (which distinguishes it from a number of the other cases in which a penalty has been imposed).

[42] A penalty of $7,500 is accordingly ordered against Mr Nicholson.

Penalty paid to whom?

[43] Section 136 provides that the Court may order that the whole or any part of any penalty recovered in any penalty action be paid to any person. One of the key purposes of the penalty provisions of the Act is to deter breaches and publicly denounce such actions. As was observed in *Stormont v Peddle Thorp Aitken Ltd*:28

> [90] In determining issues relating to penalty apportionment, the nature of the issues involved and the extent they engage public, as opposed to private, interests will be relevant. While I agree ... that the matters at issue in this case raise less acute concerns about public policy than, for example, breaches of mediator-certified settlement agreements, I do not accept the proposition that it follows that in the absence of a serious matter of public policy the whole of any penalty should be awarded to the affected individual.
> [91] There is a broad public interest in deterring the sort of employment practices which have emerged in this case, and which are appropriately reflected in part-payment to the Crown. It is, however, appropriate that any apportionment take into account the fact that it is Ms Stormont (not, for example, a Labour Inspector on behalf of the affected employee) who has had to go to the effort of bringing the breach before the Court (while being conscious of the need to avoid duplication with costs). I consider it appropriate to order that 75 per cent of each of the penalties imposed be paid to Ms Stormont, with 25 per cent to be paid to the Crown.

[44] A similar point can be made in the present case. The breaches require a response from the Court in the broader public interest, but it is Mr Ford who has had to go to the trouble and expense of bringing the breach to the Authority's attention to enable it to be addressed, both for his benefit and for the broader public good.

[45] In approaching the issue in this way, I have not overlooked the observation in *Preet* that where the breach has resulted in no compensable loss to the employee, the Court or Authority may consider directing that a portion of the penalty be paid to the

28. *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, (2017) 14 NZELR 789. (footnotes omitted)

party bringing the proceedings.29 The compensatory avenue of redress which would otherwise have been open to Mr Ford as an affected employee was effectively closed off by the company's decision to place itself in voluntary liquidation prior to the Authority's investigation meeting. It is apparent that this decision (which Mr Nicholson was involved in) was largely motivated by a desire to avoid the costs of litigation. While I have considerable sympathy for Mr Ford, I consider it appropriate to determine the recipient of the penalty payment on a split (Crown/litigant) basis; otherwise there is a risk of a penalty being applied as a de facto compensatory payment. That is not the purpose of a penalty.

[46] In *Stormont* I directed that 75 per cent of the penalty for breach of good faith be paid to Mrs Stormont, with the residual 25 per cent to be paid to the Crown to reflect the public interest component of the penalty.30 This was on the basis that as well as the broad public interest in deterring certain employment practices, the fact that an individual has had to go to the trouble of bringing and/or defending the case before the Court needs to be taken into account.31 I adopt the same course in this case.

[47] Seventy-five per cent of the penalty is accordingly to be paid to Mr Ford and 25 per cent to the Crown. Such payments are to be made within 15 working days of the date of this judgment.

Conclusion

[48] The Authority's determination is set aside and this judgment stands in its place. The plaintiff is ordered to pay a penalty of $7,500 for instigating, aiding and/or abetting a breach of Mr Ford's employment agreement. The sum of $14,000 is currently being held in a solicitor's trust account pursuant to my interlocutory judgment dated 10 May 2018.32 The amount of $7,500 is to be paid in full to the Registrar of the Employment Court at Auckland within 15 working days of the date of this judgment, with 75 per cent to be paid to Mr Ford; the remaining 25 per cent to be paid to the Crown.

29 *Preet*, above n 4, at [150].

30 *Stormont*, above n 28, at [89]-[91].

31 At [91].

32 *Nicholson v Ford* [2018] NZEmpC 44.

Costs – and possible issues relating to costs on penalty claims

[49] Costs are reserved at the request of the parties.

[50] As I indicated to counsel, given the nature of proceedings under s 134 and the public interest aspect of them, issues may arise as to whether such factors might be material in assessing where the burden of costs should lie. In this regard, a question arises, on which I wish to hear submissions if costs cannot otherwise be resolved, as to whether it is appropriate that Mr Ford bear some of the costs of defending a challenge to an Authority determination imposing a penalty for established breaches of the employment agreement.

[51] If the parties cannot otherwise agree costs, the defendant is to file and serve a memorandum and any supporting material within 20 working days of today's date, with the plaintiff filing and serving any such documentation within a further 15 working days, and anything strictly in reply within five working days thereafter.

Christina Inglis Chief Judge

Judgment signed at 2.15 pm on 12 November 2018