IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 26
EMPC 209/2017

IN THE MATTER OF	an application for the exercise of powers under sections 142B, 142E, 142J, 142L, 142M, 142X of the Employment Relations Act 2000
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	VICTORIA 88 LIMITED T/A WATERSHED BAR AND RESTAURANT Defendant
AND	GORDON LESLIE FREEMAN Second Defendant

Hearing:	(on the papers dated 9 and 13 March 2018, and by a telephone hearing held on 20 March 2018)
Representaton:	J Ongley and C English, counsel for plaintiff T McGinn, counsel for defendants
Judgment:	26 March 2018

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] A Labour Inspector instituted proceedings against Victoria 88 Limited, (which operated the Watershed Bar and Restaurant (Victoria 88)), and its director, Mr Gordon Freeman, under the recently enacted provisions of Part 9A of the Employment Relations Act 2000 (the Act).

[2] The Labour Inspector applied to the Court for:

a) declarations of breach, in relation to breaches of minimum entitlement provisions under the Holidays Act 2003 (HA) that were asserted to be serious;

b) pecuniary penalty orders, for breaches of those minimum entitlement provisions; and

c) banning orders for breaches of those minimum entitlement provisions.

[3] The application related to non-payment of holiday pay owed to multiple employees because there had been reliance by Victoria 88 or associated companies of which Mr Freeman was a director on a forfeiture clause which was said to be illegal. Initially, Victoria 88 and Mr Freeman contended that the deductions were legally permissible.

[4] Shortly before the application was to be heard, counsel filed a joint memorandum which stated that the parties had reached agreement as to certain facts, as to declarations of breach which the Court should make, and as to the imposition of banning orders; they also made a "recommendation" as to the imposition of pecuniary penalties against both defendants.

[5] At the request of the Court, further elucidation as to the basis for the proposed orders was given by memorandum; and the legal provisions involved were discussed with counsel at a subsequent telephone hearing.

[6] After considering counsel's memoranda and submissions, I have concluded that it is appropriate to make the orders which are sought.

[7] For the avoidance of doubt, I have been required to consider an "agreed position" reached by the parties, which has avoided the need for a defended hearing. The orders which I make later in this judgment, while appropriate to the facts of this case, should not be regarded as setting any precedent for future applications dealing with the penal provisions contained in either Part 9A of the Act, or elsewhere in that legislation or in legislation dealing with minimum standards of employment.

The legislative provisions

[8] Given the consensus, a summary of the background to the provisions contained in Part 9A of the Act will suffice.

[9] The Part contains what are described as "Additional provisions relating to enforcement of employment standards".

[10] The objects of the new part, which took effect from 1 April 2016, are conveniently summarised in s 142A, which provides:

> **142A Object of this Part**
>
> (1) The object of this Part is to provide additional enforcement measures to promote the more effective enforcement of employment standards (especially minimum entitlement provisions) by—
>
> (a) providing for a Labour Inspector to apply to the court for—
>
> (i) declarations of breach in relation to breaches of minimum entitlement provisions that are serious:
>
> (ii) pecuniary penalty orders for breaches of minimum entitlement provisions that are serious:
>
> (iii) compensation orders for serious breaches of minimum entitlement provisions to compensate employees who have suffered or are likely to suffer loss or damage as a result:
>
> (iv) banning orders based on certain grounds, including persistent breach of employment standards; and
>
> (b) making insurance for pecuniary penalties unlawful; and
>
> (c) providing for—
>
> (i) what is meant by being involved in a breach of employment standards; and
>
> (ii) when states of mind or conduct by certain persons are to be attributed to bodies corporate and principals; and
>
> (d) providing certain defences to breaches of minimum entitlement provisions.
>
> (2) The provisions in this Part are in addition to the provisions in—
>
> (a) sections 133 to 142; and
>
> (b) sections 223 to 235.

[11] So as to support this strengthening of employment standards, related statutes such as the Minimum Wage Act 1993 (MWA) and the Holidays Act 2003 (HA) were also amended.[1]

[12] I will deal with the applicable legislative provisions as each relevant topic is considered.

Agreed facts

[13] The parties have agreed that the facts on which the Court should proceed are as follows:

> 1. The first defendant is a limited liability company, employing staff at relevant times ("the employees").
>
> 2. The second defendant was at all relevant times, the sole director and shareholder of the first defendant company, and was the owner-operator of the first defendant company's business.
>
> 3. The business was a hospitality business, known as Watershed Restaurant and Bar ("the Watershed"). The first and second defendants took over ownership, management and operation of the Watershed on or about 15 August 2015.
>
> 4. The first defendant sold the business the Watershed in August 2017 before being served with these proceedings.
>
> 5. The employees were hospitality staff at the Watershed.
>
> 6. The first defendant advertised for employees including the "Trade Me" platform. The second defendant interviewed potential employees, and offered them employment.
>
> 7. The first and second defendants employed the employees on a standard template employment agreement, which includes a clause purporting to allow the forfeiture of final pay including holiday pay equivalent to the proportion of default by any employee in providing less than the agreed 6 weeks notice ("the forfeiture clause), as follows:
>
> *12.1 Employment may be terminated by either employer or employee on 6 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.*
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> 8. Each of the employees referred to in this proceeding agreed to the terms in the employment agreement.

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[1] Minimum Wage Act 1983, s 10; and Holidays Act 2003, s 75(2)(f) and (3).

9. The first and second defendants withheld holiday pay owing to the employees on the ending of employment where the employees breached the notice obligations in their agreements. In all but one example the employees failed to provide any notice, and in particular, where the following witnesses were owed:

    a. Dawn Thompson - $1,173.97
    b. Penny Wealleans - $1,858.50.

10. The second defendant made the decision to withhold holiday pay from the employees, advised to the plaintiff by email to the first and second defendant's accountant.

11. The plaintiff received an email dated 14 June 2016, from Mr Kaushal, the National projects manager of Ntec Tertiary Group, complaining that an un-named student working at the Watershed had not received holiday pay and requesting that the plaintiff investigate the complaint.

12. On 15 June 2016 the plaintiff alerted his manager to the existence of the email that included a reference to alleged failure to pay a student holiday pay upon resignation by a business connected with Mr Freeman who was known to the Labour Inspectorate, and obtained approval to open a file and treat it as a follow up Audit.

13. On 15 June 2016 the plaintiff emailed Mr Kaushal to advise that the plaintiff had decided to investigate the second defendant due to his history on non-compliance, requesting confidentiality for the investigation and offering confidentiality to the student who the plaintiff wanted to speak to to gather some information about the second defendant's practices.

14. The plaintiff received an email dated 16 June 2016, providing the student's name, and mobile phone number, and indicating the student wanted her name to be kept confidential.

15. On 29 June the plaintiff emailed the student seeking an indication of concerns and indicating an intention to the business in mid July as a general visit where he would speak to a number of employees in general.

16. The plaintiff received an email from the student dated 29 June 2016, advising that the student appreciated the follow up, but she "did not want to put [her]self in this situation nor to highlight her case," and declined to provide further details.

17. The Labour Inspectorate received a letter dated 5 August 2016, from I.R. Thompson Associates Limited, alleging failures to pay holiday pay, and other related matters.

18. The plaintiff prepared an Investigation Plan in respect of this matter (and referring to Mr Kaushal's complaint) on 9 August 2016.

19. These proceedings were filed on 23 August 2017.

20. The second defendant has previously owned and operated other businesses, using other companies.

21. Other companies owned and operated by the second defendant have been involved in employment proceedings before the Employment Relations Authority and the Court, where the employer has sought to rely on the forfeiture clause following an employee failing to provide contractual notice, as follows:

    a. 2013 – *Livingston v G L Freeman Holdings Limited*, [2013] NZERA Christchurch 90
    b. 13 November 2014 – *Naritha Paengkam v G. L. Freeman Holdings Limited*, [2013] NZERA Christchurch 235
    c. 23 April 2015 – *Laurel Fay McDonald v G. L. Freeman Holdings Limited*, [2015] NZERA Christchurch 52
    d. 24 July 2015 – *G L Freeman Holdings Limited v Diane Livingston* [2015] NZEmpC 120
    e. 14 August 2015 – *Eva Belley, Labour Inspector v G. L. Freeman Holdings Limited*, [2015] NZERA Christchurch 119

22. The second defendant was aware of these determinations.

23. The forfeiture clause has been considered by the Employment Relations Authority, in the determinations of:

    a. *Laurel Fay McDonald v G. L. Freeman Holdings Limited*[2]
    b. *Naritha Paengkam v G. L. Freeman Holdings Limited* [3]
    c. *Eva Belley, Labour Inspector v G. L. Freeman Holdings Limited*[4]
    d. *Livingston v G L Freeman Holdings Limited*[5]

    and has been found to be a penalty provision in the circumstances of those cases.

24. The forfeiture clause has been considered by this Court, in the determination of *G L Freeman Holdings Limited v Diane Livingston* [2015] NZEmpC 120, and has been found to be a penalty provision in the circumstances of that case.

The relevant decisions as to forfeiture

[14] The background circumstances giving rise to this proceeding are found in four determinations of the Employment Relations Authority (the Authority), and a judgment of this Court. I summarise each briefly.

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2 At para 21(c) above.
3 At para 21(b) above.
4 At para 21(e) above.
5 At para 21(a) above.

Livingston v G L Freeman Holdings Ltd, 2013[6]

[15] The Authority considered an assertion brought by Ms Livingston that the withholding of accrued annual leave and payments for alternative days, $1,943.50, amounted to the imposition of a penalty for not giving six weeks' notice, rather than a genuine pre-estimate of damage that would be caused in the event of such a breach. The requirement for such notice, and the possibility of forfeiture arose from a clause in Ms Livingston's individual employment agreement (IEA) which was in the same form as set out at paragraph 7 of the agreed facts.

[16] The Authority found that the provision was not enforceable, and ordered the company to pay Ms Livingston the forfeited accrued annual leave and payments for alternative days, together with a penalty of $500 for breaching the forfeiture clause.[7]

[17] An unsuccessful challenge was brought to the Court.[8] In his judgment of July 2015, Judge Couch concluded that the purpose of the forfeiture clause was to compel the employee to give six weeks' notice by holding over her the threat of losing wages if she did not comply. He also found that as such it was a penalty provision which, in equity and good conscience, the Court ought not to allow the plaintiff to enforce.[9] The challenge was dismissed.

Paengkam v G L Freeman Holdings Ltd, 2014[10]

[18] The Authority considered a claim for arrears of wages in the sum of $308.13. The employer asserted that Ms Paengkam was not entitled to this sum, having regard to a forfeiture clause in the same form as is set out above.[11] The Authority determined that the relevant clauses of Ms Paengkam's IEA, including cl 12.1, constituted unlawful penalty provisions. It determined that there should not have been a withholding of her wages, which the company was directed to pay together with a further sum for unpaid holiday pay.[12]

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6 *Livingston v G L Freeman Holdings Ltd* [2013] NZERA Christchurch 90.
7 At [33].
8 *G L Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120. The Court's judgment was delivered on 24 July 2015.
9 At [36].
10 *Paengkam v G L Freeman Holdings Ltd* [2013] NZERA Christchurch 235.
11 Agreed Summary of Facts, cl 7.
12 *Paengkam v G L Freeman Holdings Ltd*, above n 10, at [29]-[30].

McDonald v G L Freeman Holdings Ltd, 2015[13]

[19] At issue in this case was unpaid holiday pay for $1,047.40. Again, the employing company relied on a forfeiture clause which was in the same form as set out earlier.[14]

[20] The Authority determined that the clause was a penalty provision which was not enforceable, and ordered the company to pay Ms McDonald the unpaid holiday pay, together with interest.[15]

Belley, Labour Inspector v G. L. Freeman Holdings Limited, 2015[16]

[21] In this instance, a Labour Inspector claimed unpaid holiday and/or sick pay and/or unpaid wages said to be owed to former employees of G L Freeman Holdings Ltd; penalties were also sought for alleged breaches of the HA and the MWA. In the course of the investigation, the Authority was again required to consider cl 12.1. By this time the Employment Court had delivered its judgment in the challenge of *G L Freeman Holdings Ltd v Livingston*.[17] In light of the Court's conclusions, the Authority concluded that for the purposes of this investigation that cl 12.1 operated as an unenforceable penalty provision.[18]

Pre 1 April 2016 context

[22] Originally it was asserted that for the purposes of this proceeding:

a) Victoria 88 had failed to pay final holiday pay and wages of five employees, between August 2015 and 2016.[19]

b) Mr Freeman had been involved in serious and persistent breaches of minimum employment provisions as contained in the HA, MWA and Wages Protection Act 1983, between 2013 and 2016.[20]

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13 *McDonald v G. L. Freeman Holdings Ltd* [2015] NZERA Christchurch 52.
14 Agreed Summary of Facts, cl 7.
15 *McDonald v G. L. Freeman Holdings Ltd,* above n 13, at [17] and [18].
16 *Belley, Labour Inspector v G. L. Freeman Holdings Ltd* [2015] NZERA Christchurch 119.
17 *G L Freeman Holdings Ltd v Livingston*, above n 8.
18 *Belley*, at [62].
19 Amended Statement of Claim, para 47.
20 Amended Statement of Claim, paras 46 and 48.

[23] Because some of the alleged breaches occurred prior to the enactment of the Part 9A provisions, the parties ultimately agreed that it was not possible for the Labour Inspector to obtain formal orders with regard to breaches which allegedly occurred prior to that date.

[24] However, although the various breaches which occurred before 1 April 2016 could not be the subject of declarations, the parties agreed that these matters were relevant for context when considering the seriousness of the breaches which occurred after 1 April 2016.

Declarations of breach

[25] Sections 142B, 142C and 143D of the Act provide for the making of declarations of breach. They state:

> **142B Court may make declarations of breach**
>
> (1) A Labour Inspector (but no other person) may apply to the court for a declaration of breach.
>
> (2) The court may make a declaration of breach if the court is satisfied that—
>
> (a) a person has—
>
> (i) breached a minimum entitlement provision; or
>
> (ii) been involved in a breach of a minimum entitlement provision; and
>
> (b) the breach of the minimum entitlement provision is serious.
>
> (3) Whether a breach of a minimum entitlement provision is serious is a question of fact.
>
> (4) In determining whether a breach of a minimum entitlement provision is serious, the court may take into account—
>
> (a) the amount of money involved:
>
> (b) whether the breach comprises a single instance or a series of instances:
>
> (c) if the breach comprises a series of instances,—
>
> (i) how many instances it comprises; and
>
> (ii) the period over which they occurred:
>
> (d) whether the breach was intentional or reckless:
>
> (e) whether the employer concerned has complied with any relevant record-keeping obligations imposed by any Act:
>
> (f) any other relevant matter.

142C Purpose and effect of declarations of breach

(1) The purpose of a declaration of breach is to enable an applicant for an order against a person under this Part to rely on the declaration of breach made against the person in the proceedings for that order and not be required to prove the breach or involvement in the breach.

(2) Accordingly, a declaration of breach made against a person is conclusive evidence in relation to the person of the matters that must be stated in it under section 142D.

142D What declaration of breach must state

A declaration of breach must state the following:

(a) the minimum entitlement provision that the breach or involvement in the breach relates to; and

(b) the person the declaration applies to; and

(c) the conduct that constituted the breach or the involvement in the breach.

[26] The term "minimum entitlement provision" is defined in s 5 of the Act as follows:

minimum entitlement provisions means—

(a) the minimum entitlements and payment for those under the Holidays Act 2003; and

(b) the minimum entitlements under the Minimum Wage Act 1983; and

(c) the provisions of the Wages Protection Act 1983

[27] The parties have agreed that declarations of breach should be made as follows:

a) That Victoria 88 breached a minimum entitlement provision, being s 27(1)(b) of the HA, in relation to Penny Wealleans and Dawn Thompson, by failing to pay her holiday pay which was owed on the termination of employment.

b) That Mr Freeman is a director of Victoria 88 and was a person involved in a breach of a minimum entitlement provision, being s 27(1)(b) of the HA, in that he knowingly directed Victoria 88's failure to pay holiday

pay owing on the termination of employment in relation to Penny Wealleans and Dawn Thompson.

[28] The parties agreed that these breaches were serious, taking into account that the background of the subject breaches comprised a series of instances involving a number of different employees, that the first and second defendants' actions were intentional, and that those breaches followed decisions of the Employment Relations Authority, and the Court, involving Mr Freeman.

[29] I agree. Given these factors it is appropriate for the Court to make the declarations which are sought. I will record those later in this judgment.

Banning orders

[30] The making of a banning order is a very significant step. The following provisions provide for such orders:

> **142M Banning orders**
>
> (1) The court may make a banning order against a person if—
>
> (a) the court has made a declaration of breach in respect of the person; or
>
> (b) the court is satisfied that the person has persistently breached, or persistently been involved in the breach of, 1 or more employment standards; or
>
> (c) the person has been convicted of an offence under section 351 of the Immigration Act 2009.
>
> (2) The persons who may apply for a banning order are—
>
> (a) a Labour Inspector:
>
> (b) an immigration officer under the Immigration Act 2009.
>
> (3) For the purposes of subsection (1)(b), a past breach is not evidence that a person has persistently breached, or persistently been involved in the breach of, 1 or more employment standards if the person concerned established a defence under section 142ZC or 142ZD (as the case may be) in relation to that past breach.
>
> **142N Terms of banning order**
>
> (1) If the court makes a banning order, the order must prohibit the person from doing 1 or more of the following:
>
> (a) entering into an employment agreement as an employer:

(b) being an officer of an employer:

(c) being involved in the hiring or employment of employees.

(2) A person who is subject to a banning order may do something prohibited by the order if the person first obtains the leave of the court to do so.

(3) In this section, **officer** means—

(a) a person occupying the position of a director of a company if the employer is a company:

(b) a partner if the employer is a partnership:

(c) a general partner if the employer is a limited partnership:

(d) a person occupying a position comparable with that of a director of a company if the employer is not a company, partnership, or limited partnership:

(e) any other person occupying a position in the employer if the person is in a position to exercise significant influence over the management or administration of the employer.

142O Duration of banning order

A banning order under section 142M has effect for—

(a) 10 years; or

(b) any shorter period specified in the order.

142Q General provisions for banning orders

(1) A Registrar of the court must, as soon as practicable after making a banning order,—

(a) give notice to the chief executive that the order has been made; and

(b) publish a notice in the *Gazette* stating—

(i) the name of the person against whom the banning order has been made; and

(ii) the terms of the order; and

(iii) the period or dates for which the order applies.

(2) A person intending to apply for the leave of the court under section 142N(2) must give the chief executive at least 10 working days' written notice of that intention.

(3) The department, and any other person the court thinks fit, may attend and be heard at the hearing of an application for leave.

142R Offence to breach banning order

> A person who breaches a banning order commits an offence and is liable on conviction by the District Court or the High Court to a fine not exceeding $200,000, a term of imprisonment not exceeding 3 years, or both.

[31] The term "employment standards" as used in s 142M is defined in s 5 of the Act as follows:

> **employment standards** means any of the following:
>
> (a) the requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130:
>
> (b) the provisions of the Equal Pay Act 1972:
>
> (c) the minimum entitlements and payment for those under the Holidays Act 2003:
>
> (d) the requirements of sections 81 and 82 of the Holidays Act 2003:
>
> (e) the minimum entitlements under the Minimum Wage Act 1983:
>
> (f) the provisions of the Wages Protection Act 1983

[32] In this case, the relevant employment standards are those described in sub-para (c) that is, the minimum entitlements and payment for those under the HA.

[33] In introducing the proposal for these provisions, the Minister of Workplace Relations[21] referred to the fact that they are similar in kind to certain provisions in the Companies Act 1993 and the Financial Markets Conduct Act 2013; the main difference of course is that the provisions introduced in Part 9A have a particular focus on the employment of employees. The Minister also said that the relevant provisions were "intended to deter non-compliance in employers who value their reputation as a good employer".[22]

[34] Although it relates to the predecessor of s 383 of the Companies Act 1993, it is worth mentioning an observation made by Gault J in *First City Corporation Ltd v Downsview Nominees Ltd*, where he characterised the provision as providing for:[23]

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21 Office of the Minister of Workplace Relations and Safety "Strengthening enforcement of employment standards (undated) at 30; see also MBIE "Employment Standards Bill: Departmental Report to the Transport and Industrial Relations Committee" (3 December 2015) at 45; referring to Companies Act 1993, ss 383 and 385 and Financial Markets Conduct Act 2013, ss 489-517.

22 Office of the Minister of Workplace Relations and Safety "Strengthening enforcement of employment standards (undated) at 41.

23 *First City Corporation Ltd v Downsview Nominees Ltd (No 2)* [1989] 3 NZLR 710 (HC) at 130.

> ... denial of the privilege of participating in the conduct of business under the shelter of limited liability. It is penal in nature although the disqualification should be approached with protection of the public in mind rather than punitively.

[35] In a subsequent discussion concerning s 385 of the same Act, Miller J said it was a provision by which a Registrar may prohibit persons from managing companies, in this way:[24]

> Prohibition is aimed not at remedying wrongs done to shareholders and creditors of the insolvent company but of protecting the public from unscrupulous or incompetent directors in future, deterring others, and setting appropriate standards of behaviour. At the same time, any given director or manager inevitably experiences prohibition as a punishment; it is an adverse consequence of an inquiry into his or her involvement in an insolvent company.

[36] With necessary modifications, I regard the themes expressed in these judgments as being of general assistance when considering the making of the banning orders which are sought, for the purposes of this proceeding.

[37] The terms of the banning orders which the parties have agreed should be made are as follows:

a) That Victoria 88 shall not enter into any employment agreement as an employer or be involved in the hiring or employment of employees for a period of three years.

b) That Mr Freeman shall not enter into an employment agreement as an employer, or be an officer of an employer; or be involved in the hiring or employment of employees for a period of three years.

[38] The order should be made under s 142M(1)(a), which permits an order to be made where there is a declaration of breach, as here. Given the time limitation issues referred to above,[25] I do not consider that it is appropriate to rely on s 142M(1)(b), because although there have in fact been persistent breaches, most of those occurred prior to 1 April 2016.

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[24] *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC) at [91].
[25] See above at para [23].

[39] A banning order is a significant limitation on any potential employer; and it obviously affects the individual's reputation to his or her detriment. It should only be made where there is a serious breach or breaches of minimum standards. Such orders are likely to be rare. They are, however, justified here.

[40] In short, I am well satisfied that it is appropriate to make both banning orders. I will record their terms later in this judgment.

[41] These orders will be notified to the Chief Executive of the Ministry of Business, Innovation and Employment, and by notice in the Gazette, as required by s 142Q.

Pecuniary penalties

[42] The parties also made submissions as to appropriate pecuniary penalties.

[43] The applicable provisions are found in ss 142E to 142I. I reproduce the first five of those sections:

> **142E Pecuniary penalty orders**
>
> (1) The court may make a pecuniary penalty order against a person in respect of whom the court has made a declaration of breach.
>
> (2) An application for a pecuniary penalty order may be made—
>
> (a) only by a Labour Inspector; and
>
> (b) at the following times:
>
> (i) when application is made for a declaration of breach; or
>
> (ii) subsequently, whether before or after the application for a declaration of breach is determined.
>
> **142F Matters court to have regard to in determining amount of pecuniary penalty**
>
> In determining an appropriate pecuniary penalty under section 142E, the court 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.

142G Maximum amount of pecuniary penalty

If the court determines that it should make a pecuniary penalty order, the maximum amount it may specify in the order is,—

(a) in the case of an individual, $50,000:

(b) in the case of a body corporate, the greater of—

(i) $100,000; or

(ii) 3 times the amount of the financial gain made by the body corporate from the breach.

142H Chief executive or Labour Inspector may enforce payment of pecuniary penalty

The chief executive or a Labour Inspector may recover in the District Court as a debt due to the Crown any pecuniary penalty ordered by the court under section 142E.

142I Limitation period for actions for pecuniary penalty orders

An application for a pecuniary penalty order under this Part must be made within 12 months after the earlier of—

(a) the date when the breach first became known to a Labour Inspector; and

(b) the date when the breach should reasonably have become known to a Labour Inspector.

[44] The first memorandum filed by counsel recorded their submission that taking into account the agreed facts and the applicable statutory provisions, an appropriate total penalty would be $20,000. Counsel went on to request that a portion of the penalties be awarded to certain former employees.

[45] Attached to this judgment is an Appendix naming the employees whose holiday pay had been withheld in reliance of the forfeiture clause because they had not given six weeks' notice of termination, although one of them did give two weeks' notice; and recording the sums which counsel proposed should be paid to each former employee. I was subsequently advised that those sums were founded on the amount of holiday pay which the employer failed to pay in each instance.

[46] For the purposes of considering these recommendations, I requested counsel to outline the approach which they had adopted with regard to the principles outlined in *Borsboom v Preet PVT Ltd.*[26] In that case a full Court provided guidance as to the assessment of ordinary penalties for the purposes of s 135 of the Act, as distinct from pecuniary penalty orders.[27]

[47] For the purposes of Part 9A, s 142F stipulates the matters the Court is to have regard to in determining the amount of a pecuniary penalty. Section 133A contains an identical description of matters to be considered when an ordinary penalty is under consideration. But in both instances, the Act is silent as to how those matters are to be weighed. It is that issue which *Preet* addressed.

[48] The full Court considered that the matters referred to in the recently enacted s 133A confirmed largely, although not completely, previous judge-made law.[28] The Court observed that factors which had been identified in judge-made law – particularly in *Tan v Yang* - were now reflected in the matters which the Authority and Court were to consider when fixing a penalty under s 133A.[29] The Court went on to describe a four-step process which would allow an assessment of the various factors giving rise to the breach.[30]

[49] Given the similarity between ss 133A and 142B, I considered that a *Preet* analysis would provide assistance to the Court for the purposes of this case, when considering whether the parties' submission as to a pecuniary penalty should be accepted.

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26 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.
27 At [4].
28 At [6].
29 At [67]-[68] citing *Tan v Yang* [2014] NZEmpC 65, [2014] ERNZ 733 at [32].
30 Summarised at 151.

[50] I emphasise, however, that whilst such an approach is helpful for present purposes where there is agreement between the parties, the Court may have to consider whether a *Preet* analysis is appropriate in other contexts.

[51] Counsel advised that in summary their "recommendation" was reached in the following way:

a) Nature and number of breaches: Victoria 88 had breached s 27(1)(b) of the HA. The maximum quantum of penalties which could be imposed against that party as a body corporate for two breaches was $200,000, under s 142G; the maximum quantum of penalties that could be imposed against Mr Freeman as a person involved for two breaches was $100,000.

b) Assessment and severity of breaches for each defendant: the parties agreed that the breaches met the threshold of "seriousness", but they fell at the lower end of the "seriousness" scale having regard to these factors:

- The amount of money involved was low. A total of approximately $3,400 was owed to the two employees involved.
- There were two breaches, both at the end of employment relationships.
- The breaches were intentional, as had been agreed in the statement of agreed facts.
- There were no breaches of recordkeeping requirements; the underpayments were agreed by the employees who had breached their notice obligations in their IEAs.

In considering mitigation, the following factors were considered:

- Both defendants had cooperated during the Labour Inspector's investigation.

- They were willing to settle outside of the Court process.
- Both parties recognised litigation risk and cost in proceeding to a defended hearing.
- The parties agreed that a portion of any penalty be applied to compensate former employees.
- Mr Freeman (and I note Victoria 88) had agreed to a banning order for three years.

Taking into account aggravating and mitigating factors, the parties agreed that a starting point in the region of 10 per cent of the maximum was appropriate for Victoria 88: $20,000; and taking those factors into account, they agreed that a starting point with regard to Mr Freeman was 10 per cent of the maximum: $10,000.

c) Financial circumstances of the parties, which were described as follows:

- Victoria 88 had ceased trading and no longer employed staff. Its liabilities exceeded assets by a significant margin, including a current account debt owed to Mr Freeman of more than $300,000.
- Victoria 88 was sold for a substantial loss, with vendor finance being required for a significant proportion of the purchase price when the business was sold.
- Any penalty payment would be personally funded by Mr Freeman, who was in a position to pay the level of penalty recommended to the Court.

d) Proportionality of outcome: it was submitted that a penalty of $10,000 for each defendant was appropriate, noting that Mr Freeman would personally fund Victoria 88's liability. The parties also agreed that a

portion of any penalty be on-paid to the former employees, according to the Appendix attached to this judgment.

[52] Standing back, I am satisfied that the amounts which were referred to by counsel in their submission are appropriate, having regard to the serious breaches which occurred, and noting also that no compensation orders are to be made. I consider that penalties totalling $20,000, which will have to be paid by Mr Freeman since Victoria 88 cannot, will have a deterrent effect, specific and general. Those orders will appropriately express the community's disapproval of the serious breaches of minimum employment standards which have occurred in this case.

[53] Finally, I turn to the question of the payment of part of the penalty orders to individuals, most of whom are not the subject of the declaration of the breach.

[54] Counsel submitted that although Part 9A is silent on this topic, s 142A states that the provisions of the Part are in addition to those which are found in ss 133 to 142.

[55] Accordingly, s 136(2) is a provision which applies to pecuniary penalties under Part 9A. It provides that the Court may order that the whole or any part of a penalty may be paid to "any person".

[56] For the purposes of this case, the Court can direct payment not only to those employees who are named in the declarations of breach, but to other persons if the Court is satisfied that the interests of justice so require.

[57] Accordingly, I direct that a portion of the penalty which is to be paid by Mr Freeman is to be on-paid to the former employees named in the Appendix to this judgment. I am satisfied that the proportion of the penalties to be paid to the affected employees is within the range sanctioned in previous cases.[31] The balance is to be paid to the Crown account.

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[31] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [89]-[90].

Conclusion

[58] The following declarations of breach are made:

a) Victoria 88 has breached a minimum entitlement provision, being s 27(1)(b) of the HA, in relation to Penny Wealleans and Dawn Thompson, by failing to pay holiday pay owed to them on the termination of their employment.

b) Mr Freeman was the director of Victoria 88 and was a person involved in a breach of a minimum entitlement provision being s 27(1)(b) of the HA, in that he knowingly directed Victoria 88's failure to pay holiday pay owing in the termination of employment in relation to Penny Wealleans and Dawn Thompson.

[59] The following banning orders are made:

a) Victoria 88 shall not enter into any employment agreement as an employer or be involved in the hiring or employment of employees for a period of three years from the date of this judgment.

b) Mr Freeman shall not enter into an employment agreement as an officer; or be an officer of an employer; or be involved in the hiring or employment of employees for a period of three years from the date of this judgment.

[60] These orders will now be notified as required under s 142Q of the Act.

[61] The following pecuniary penalties are ordered:

a) Each of Victoria 88 and Mr Freeman are to pay a pecuniary penalty of $10,000.

b) Those penalties are to be paid to the Registrar of the Employment Court. In respect of the pecuniary penalty payable by Mr Freeman, the sum of $7,845 is to be paid to the Labour Inspector for disbursement to

the individuals and in the amounts described in the Appendix to this judgment. The balance of those sums shall be paid to a Crown bank account.

[62] There are no issues as to costs.

B A Corkill
Judge

Judgment signed at 4.45 pm on 26 March 2018

APPENDIX – PAYMENTS TO BE MADE TO FORMER EMPLOYEES

a.	Jessica Dwyer	$200
b.	John Finlayson	$400
c.	Karsha May	$250
d.	Rana Vincent	$100
e.	Rebecca Jackson	$650
f.	Rebekah Tanner	$45
g.	Josie Aymes	$400
h.	Kulveer Kaur	$100
i.	Liam Taylor	$100
j.	Jessie Ellis	$50
k.	Natasha Bisset	$50
l.	Sara Wightman	$250
m.	Stella Sales	$250
n.	Jemma Forsyth	$150
o.	Liberty Stevenson	$50
p.	Steffan Pickavance	$50
q.	Dawn Thompson	$1,200 [2 weeks' notice provided]
r.	Penny Wealleans	$1,900
s.	Justina Collins	$50
t.	Sandra Beltman	$200
u.	Ruia Annan	$500
v.	Zeila Aabala	$800
w.	Mary Endaya	$100