

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 119  
5539535

BETWEEN EVA BELLEY, LABOUR  
INSPECTOR  
Applicant

AND G. L. FREEMAN HOLDINGS  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Ella Tait, Counsel for the Applicant  
No appearance for the Respondent

Date of investigation meeting: 29 July 2015

Determination: 14 August 2015

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**DETERMINATION OF THE AUTHORITY**

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**A. Within 28 days of the date of this determination G. L. Freeman Holdings Limited is ordered to pay Eva Belley \$7,122.86 gross being made up of:**

- (i) \$1,937.00 gross for the benefit of Barbara Morriss; and**
  - (ii) \$1,429.00 gross for the benefit of Brigette Green; and**
  - (iii) \$1,402.94 gross for the benefit of Jin (Kimmy) Sun; and**
  - (iv) \$2,353.92 gross for the benefit of Angelique Singh; and**
- must also pay interest of 5% per annum on all amounts until paid in full calculated from:**

- 28 July 2014 for Brigette Green;**
- 7 November 2014 for Angelique Singh;**
- 20 June 2014 for Jin Sun; and**
- 2 February 2014 for Barbara Morriss.**

**B. Within 28 days of the date of this determination G. L. Freeman**

**Holdings Limited must pay a penalty of \$15,000 with \$500 to be paid to Jun Sun and \$14,500 to be paid to the Employment Relations Authority for transfer to the Crown Account.**

**C. Within 28 days of the date of this determination G. L. Freeman Holdings Limited must pay Eva Belley the cost of the filing fee of \$71.56.**

### **Employment relationship problem**

[1] Eva Belley, Labour Inspector, claims unpaid holiday and/or sick pay and/or unpaid wages owed to four former employees of G. L. Freeman Holdings Limited (G L Freeman); Brigette Green, Angelique Singh, Jin (also known as Kimmy) Sun and Barbara Morriss. Ms Belley also seeks penalties for what she alleges were breaches by G L Freeman of provisions of the Holidays Act 2003 (the Holidays Act), the Wages Protection Act 1983 (the WP Act) and the Minimum Wage Act 1983 (the MW Act).

### **Procedural background**

[2] G L Freeman, whose sole shareholder and director is Gordon Freeman, ran The Redwood Hotel and Sequoia 88 restaurant in Christchurch for many years. The business was sold in early 2015. These claims are all to do with events related to when G L Freeman ran the business. Ms Morriss and Ms Green were employed as receptionists. Ms Sun and Ms Singh were waitresses.

[3] G L Freeman's registered address and address for service on the Companies Office website remain 340 Main North Road, Redwood, which is the address of the business premises no longer operated by G L Freeman. The first application by Ms Belley on behalf of Ms Singh and Ms Green was lodged on 28 January 2015 and was served via courier at the business address on 26 February 2015.

[4] The Authority officer used an email address for Mr Freeman that he had previously given the Authority to advise of a teleconference I asked her to organise. However, a current staff member of the Redwood Hotel advised her to deal directly with Mr Freeman and supplied his mobile phone number. A new postal address of PO Box 5190 was also supplied to the Authority officer and it was noted that

Mr Freeman had not been on the premises for two months. It appears that Mr Freeman does not have an email address.

[5] A teleconference was held on 6 March 2015 between myself, Ms Belley, Ms Tait and Mr Freeman. By then the statement of problem had been amended (on 9 March 2015) and now included claims on behalf of Ms Morriss. However, Ms Belley advised that she intended to lodge a further amended statement of problem and she was directed to do so by 15 May 2015. Mr Freeman notified me that he had instructed counsel, Tim McGinn. Mr McGinn was directed to lodge a statement in reply within 14 days of receiving the amended statement of problem.

[6] The further amended statement of problem was lodged on 13 May 2015 and added Ms Sun's claims.

[7] Mr McGinn lodged the statement in reply on 3 June 2015 having sought and been granted an extension of time. On 8 June 2015 I held a teleconference with Ms Belley, Ms Tait and Mr McGinn. The investigation date of 29 July 2015 was set and dates for exchange of witness evidence were also set. Mr McGinn did not lodge the respondent's witness statements by the date directed.

[8] On 20 July the Authority officer notified the applicant that the Companies Office website stated:

*This company is now overdue in its obligation to file an annual return. If the annual return is not filed immediately the Registrar will initiate action to remove the company from the register.*

[9] On 20 July the Authority officer enquired of Mr McGinn when the evidence would be received. On 22 July 2015 Mr McGinn responded notifying the Authority that he had difficulty getting hold of Mr Freeman and had only been able to contact him the previous evening.

[10] Mr McGinn said he was unable to file witness statements due to his inability to get instructions from Mr Freeman. He notified the Authority that Mr Freeman had suffered an accident and had been in hospital.

[11] I enquired of Mr McGinn whether that meant Mr Freeman was asking for an adjournment. He responded that he did not have instructions to apply for an adjournment and had told Mr Freeman that the investigation meeting was likely to

proceed, whether or not G L Freeman was represented. I took it from Mr McGinn's emails that he had withdrawn as counsel.

[12] There was no representative for G L Freeman present at 9.30 am on 29 July, when the meeting was due to commence. I waited until 9.40 am and then proceeded to hear and determine the matter in the absence of a representative of G L Freeman as I am empowered to do by Clause 12, Schedule 2 of the Employment Relations Act 2000 (the Act).

[13] As permitted under s.174 of the Act, this determination has not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

[14] I received written evidence and heard oral sworn or affirmed evidence from Ms Belley, Ms Green, Ms Morriss, Ms Singh and Ms Sun. I asked them questions to test their evidence and some further questions were asked by Ms Tait. I also heard oral evidence given under oath from Stephen Pike, Ms Sun's husband, about a conversation he had over the telephone with Mr Freeman which Ms Sun had referred to in her written evidence.

[15] At the conclusion of the investigation meeting on 29 July 2015 I gave an oral indication to each of the former employees and the Labour Inspector of what my likely findings would be.

### **Issues**

[16] The issues for each former employee are different. I need to determine:

- (i) Whether G L Freeman was required to pay out Ms Green's and Ms Morriss' reinstated annual leave entitlements upon the termination of their employment or whether it was entitled to withhold that pay for any reason?
- (ii) Did Ms Singh abandon her employment?
- (iii) Did Ms Singh work on 6 November 2014?
- (iv) What wages are due to Ms Singh for work on 5 and 6 November 2014?
- (v) What amount of sick pay and holiday pay are due to Ms Singh?

- (vi) Was G L Freeman entitled to withhold Ms Singh's final pay under clause 12.1 of her individual employment agreement?
- (vii) Did Ms Sun abandon her employment?
- (viii) Was G L Freeman entitled to withhold Ms Sun's final pay under clause 12.1 of her individual employment agreement?
- (ix) What precise sums are due to each ex-employee?
- (x) Should interest be paid on unpaid sums due?
- (xi) Did G L Freeman breach provisions of the Holidays Act, the MW Act and the WP Act?
- (xii) If so, should penalties be imposed and, if so, in what amount?
- (xiii) Should G L Freeman reimburse the filing fee?

**Should Ms Green and Ms Morriss be paid for reinstated annual leave that was due at the end of their employment?**

[17] In May 2014 the Labour Inspectorate undertook an audit of holiday and leave records and time and wages records of G L Freeman's Redwood Hotel business after a complaint from a former employee.<sup>1</sup> In the course of that audit it was discovered that some receptionists were regularly rostered on annual leave, for a day every week, by Mr Freeman without any consultation with them and without them having applied for that leave.

[18] Ms Belley issued an Improvement Notice on 23 June 2014 requiring G L Freeman to reinstate the annual leave entitlements of employees, including Ms Green and Ms Morriss.

[19] Mr Freeman told Ms Belley that the annual leave noted on the rosters had been verbally agreed to between him and the receptionists.

[20] Ms Morriss and Ms Green's evidence is that they never agreed to the way their annual leave was used in the rosters prepared by Mr Freeman. I accept that.

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<sup>1</sup> Not one of those on whose behalf Ms Belley brings these proceedings.

[21] G L Freeman wrote to Ms Morriss and to Ms Green stating that their annual leave entitlements had been reinstated. In Ms Green's case that was for 87 hours at a value of \$1,429.

[22] When Ms Green resigned her final pay did not include payment for those 87 hours.

[23] In its statement in reply, G L Freeman stated that at no time during their employment, when the roster regularly attached a day of annual leave, did Ms Green or Ms Morriss complain or indicate that they (no longer) agreed to the practice of taking annual leave in that way. G L Freeman stated that if Ms Green or Ms Morriss did not intend to take paid leave, then they had received wages from G L Freeman under false pretences and in bad faith.

[24] The statement in reply states that the respondent clarified with Ms Green and Ms Morriss whether or not they required to be paid the reinstated annual leave a second time, in other words, at the end of their employment. The statement in reply says that both of them "*on multiple occasions reiterated that they did not wish to be paid a second time*". The statement in reply says that in reliance on this representation G L Freeman advised it was reinstating the leave balance to the applicants, believing that no payment for that leave would be required when the employees took the leave that was reinstated or left employment without having taken the leave:

*Upon leaving employment with the respondent both Green and Morriss have reneged on their agreement with the respondent and have claimed payment of the reinstated leave.*

[25] The statement in reply also claims that Ms Belley's calculations about the leave reinstatement are incorrect because even if Ms Green's and Ms Morriss' withdrawal of their agreement is accepted, G L Freeman was entitled to direct employees to take accrued leave after 12 months of employment.

[26] I questioned Ms Green and Ms Morriss at the investigation meeting about whether they had discussions with Mr Freeman in advance of days of annual leave being rostered into their roster. They both told me that Mr Freeman did not consult with them before producing the rosters and once he had produced the rosters, he would not change them. Ms Green said:

*After working at the reception for over 6 months I started to notice that on the roster there was A/L marked on some days.*

*I tried to approach Gordon multiple times to clarify the A/L on the roster but he was always busy or did not want to talk about it. The only way I could find out was to ask [the payroll clerk] who explained that these days were annual leave off and that I had very few hours annual leave left.*

...

*After repeatedly being rostered on "compulsory annual leave" I started to wonder what would happen if I'd liked to take a longer leave period, so I tried to ask Gordon about it.*

*Every time I tried to approach Gordon about this issue (in person via phone) he claimed that he was too busy and ignored my request. He was intimidating and unapproachable about my requests.*

...

*Gordon would not discuss any employment matters with me. I never knew if I would have leave approved unless I saw it on the roster.*

*In June 2014 I provided Gordon a notice of intention to resign. I gave six weeks' notice as per my contract.*

...

*I left Redwood Hotel on 27 July 2014.*

*On 30 July 2014 I received a letter via post stating my reinstated annual leave entitlements of 87 hours and a hand written note that this needs to be discussed with Gordon.*

*My final pay never included the 87 hours of reinstated annual leave and Gordon has never contacted me to discuss.*

[27] Ms Green was adamant that she had never requested nor been asked for her permission to use annual leave as rostered days in the roster in the way utilised by G L Freeman within her first 12 months of her employment. She was also adamant that Mr Freeman had not directed her to take any annual leave after her first 12 months of employment except by way of putting it on the roster.

[28] I am satisfied that the annual leave days scattered throughout the rosters were not taken by agreement with Ms Green and were not actually directed to be taken as annual leave days. I do not find that rostering someone on annual leave without any advance discussion, consultation or warning is the same thing as directing an employee to take annual leave.

[29] Ms Green was also very clear that not only did she never say to Mr Freeman that she did not wish to be paid for the 87 hours of reinstated annual leave but also that it was never discussed between them.

[30] **I am satisfied that G L Freeman must pay Ms Green for the 87 hours of annual leave that was reinstated and to which she is entitled. The amount she is owed is \$1,429 gross.**

[31] In relation to Ms Morriss, she also gave evidence that Mr Freeman prepared a fortnightly roster which came out a fortnight in advance and her schedule was initially close to being 40 hours a week. She often worked public holidays and when she did this she received time and a half payment and a day in lieu as an alternative holiday. However, she stated that at one point she realised that G L Freeman was allocating her annual leave on a regular basis on the roster, noted as "OFF A/L". She says that this was done without her agreement and so she discussed this with the other receptionists. She found that this was happening to them too.

[32] Ms Morriss rang the payroll clerk to query her annual leave balance and was advised she only had a few days even though she had actually only had seven days paid annual leave that she had requested since the beginning of her employment. Ms Morriss said that she realised then there was a shortfall in her annual leave.

[33] Ms Morriss said that Mr Freeman would not discuss any employment matters with her:

*... as he was not approachable ... I felt that he was not easy to deal with or discuss employment matters. He was intimidating and often shouted at the staff. This did not make it easy to approach him.*

[34] On 30 July 2014, Ms Morriss received a letter from Mr Freeman stating that she had been reinstated annual leave entitlements of 117 hours. Soon after that, she had a short meeting with Mr Freeman and the payroll clerk in which he acknowledged having reinstated 117 hours and:

*For the first time we agreed that it would be my decision on whether I used an annual leave day or a lieu day to make up any shortfall in hours.*

*I did not use any of the reinstated hours of annual leave during the remainder of my employment.*

[35] When the Redwood Hotel business was sold Ms Morriss' employment with G L Freeman ended. It was her evidence that her final pay did not include her reinstated annual leave of 117 hours.

**[36] I am satisfied that G L Freeman must pay Ms Morriss for the 117 hours of annual leave that was reinstated and to which she is entitled. The amount she is owed is \$1,937 gross.**

**Did Ms Singh abandon her employment?**

[37] G L Freeman's statement in reply says the respondent accepted it had incorrectly determined that Ms Singh had abandoned her employment. The statement in reply said that G L Freeman proposed to remedy that by paying Ms Singh her sick leave and final holiday pay. However, G L Freeman disputed that Ms Belley's calculation of minimum wages for 5 and 6 November 2014 was correct. Instead, G L Freeman says that Ms Singh worked 4.25 hours on 5 November and did not work at all on 6 November because she was not guaranteed any hours of work that day.

[38] Ms Singh gave six weeks written notice of her resignation to G L Freeman on 25 September 2014. Ms Singh was absent from work due to illness on 22 and 23 October 2014, She provided a medical certificate to G L Freeman when she returned to work on 24 October 2014. However, she was still ill that day and Mrs Freeman suggested that she went home early, which she did.

[39] The following day Ms Singh was still ill. She says that she attempted to ring Mr Freeman and left him a voice message as well as texting him to say she was sick and could not do her lunch shift and could not be on call for the evening shift.

[40] Ms Singh's evidence at the investigation meeting was that she worked evening shifts on 5 November and on 6 November 2014 as rostered starting at 5.30pm as usual. However, Ms Singh says that on 6 November at about 8.20pm Mr Freeman noticed her working and pulled her aside accusing her of having abandoned her job. He told her that he did not receive any messages or voicemail to the effect that she was ill and repeated that she had abandoned her employment and therefore he sent her home.

[41] Ms Singh says her final pay did not include any pay for the hours she worked on 5 and 6 November 2014.

[42] Ms Belley has calculated Ms Singh's unpaid wages for 5 and 6 November based on the relevant minimum wage, although Ms Singh was actually paid more than minimum wage under her individual employment agreement. The relevant minimum wage at the time was \$14.25 per hour. The amount claimed by way of unpaid wages for Ms Singh is \$102.60.

[43] Despite acknowledging that G L Freeman owed Ms Singh holiday pay and sick leave in its statement in reply on 3 June 2015 as at the date of the investigation meeting Ms Singh had not been paid the sick leave pay and holiday pay she is owed.

[44] I find it proved that on 5 November 2014 Ms Singh worked from 5.30pm to 9.50pm; a total of four hours and 20 minutes for which she should be paid. I also find it proved that on 6 November 2014, Ms Singh worked from 5.30pm to 8.30pm; a total of three hours, after which she was sent home by Mr Freeman. Ms Singh must be paid for a total of 7 hours and 20 minutes at the minimum wage which amounts to \$102.60.

[45] I find it proved that Ms Singh was ill and unable to work her rostered shifts on 22, 23, 25 and 26 October 2014. I am satisfied that she not only adequately notified G L Freeman of her illness but also supplied a medical certificate for part of that time. Ms Singh is owed paid sick leave in the amount of \$300.00 which must be paid to her by G L Freeman.

[46] Ms Belley has calculated Ms Singh's holiday pay entitlement which includes pay for alternative days in lieu of public holidays worked and the annual leave entitlement remaining at the end of her employment once paid leave that she had taken had been deducted. I accept her calculations. The holiday pay which G L Freeman must pay Ms Singh was \$1,951.32.

[47] **Ms Singh is owed \$2,353.92 gross.**

***What is Jin Sun entitled to?***

[48] Ms Sun worked as a waitress between 6 December 2013 and 11 May 2014. She had originally asked to take some leave to go back home to China to visit her mother who was ill. Ms Sun applied for the leave in writing. She wished to take 26 days off work, some of which would have been unpaid. Ms Sun had her leave request form returned to her with the words "*not approved sorry*" written on it.

[49] Ms Sun's evidence was that she spoke to her duty manager, Martha Freeman. Mrs Freeman told her that if she went on leave to China there might not be a job for her to come back to. Mrs Freeman asked Ms Sun for the date of her departure. Ms Sun says that she wrote down her departure date and her return date, being 17 May to 6 June 2014. Ms Sun asked Mrs Freeman if she needed to hand in her resignation in writing. Ms Sun's evidence is that Mrs Freeman verbally advised her that that was not necessary as she only wished to know the exact date Ms Sun was leaving.

[50] Ms Sun's evidence is that on 10 May 2014 both Mr and Mrs Freeman asked her to go and see Mrs Freeman when she got back from China to see if there was work available.

[51] Ms Sun says that on 16 June 2014, after her return from China, Mrs Freeman called her and asked her if she could work the following day. Ms Sun went to work and was given a new individual employment agreement. The individual employment agreement did not have her name or an hourly rate written on it. Ms Sun's evidence was that she worked as she had been asked to and got paid for the hours she worked.

[52] Ms Sun says that on 19 June, Mrs Freeman asked her if she had signed her new contract and when Ms Sun said she would like to discuss the details of the contract, such as what the hourly rate would be, Mrs Freeman refused to do so. Instead, she pulled the individual employment agreement out of Ms Sun's hand and said that if she did not sign the agreement as it was there would be no job for her there. Ms Sun says that after that she asked Mrs Freeman about her holiday pay and pay for alternative days in lieu of having worked public holidays that had not been paid at the end of her employment in May 2014. Ms Sun says she did not take any paid annual leave at all during her employment and believed that she was owed seven days in addition to the alternative holidays that she had not taken.

[53] Ms Sun says that Mrs Freeman told her that because she had terminated the contract she could not get any final holiday pay. Ms Sun said that she reminded Mrs Freeman that she had given more than the six weeks' notice required under her individual employment agreement before she left. Mrs Freeman agreed with her but then said that she had not worked there for 12 months and so was not entitled to any annual leave. Ms Sun pointed out that she should receive 8% of her gross earnings with her final pay. Mrs Freeman then said she would talk to Mr Freeman.

[54] I am satisfied that Mr Freeman called Ms Sun's home and spoke to her husband, Mr Pike. Mr Freeman told Mr Pike that Ms Sun was not entitled to her holiday pay because she had not resigned in writing as was required in her individual employment agreement. Mr Pike told Mr Freeman that Mrs Freeman had told Ms Sun that resignation in writing was not required.

[55] G L Freeman's position in the statement in reply was that Ms Sun had abandoned her employment in May 2014 and therefore had forfeited any right to her holiday pay.

[56] Ms Sun has still not been paid any of the holiday pay or pay for alternative days in lieu of public holidays worked that she was owed. I am satisfied by Ms Sun's, Mr Pike's and Ms Belley's evidence and Ms Belley's calculations that Ms Sun must be paid the annual leave and alternative holiday amounts owed to her for her first period of employment for the following reasons:

- (a) Clause 12.1 in Ms Sun's individual employment agreement did not entitle G L Freeman to withhold her final holiday pay because she did give more than six weeks' notice of her resignation; and
- (b) G L Freeman, through Mrs Freeman, had waived its right to insist on **written** notice of resignation.

[57] In the alternative I consider the argument that G L Freeman may have made if it had been represented at the investigation meeting. Even if Ms Sun had not given six weeks' notice as required under clause 12.1 of the G L Freeman standard individual employment agreement (the IEA) it is likely that I would have found that G L Freeman was not entitled to withhold her holiday pay.

[58] Clause 12.1 reads:

*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.*

[59] Clause 6.3 reads:

*Should the employee be indebted to the employer for wages forfeited due to lack of notice (Clause 12.1) ... the employee agrees that the appropriate sum may be deducted from the employee's wages and/or holiday pay or final pay.*

[60] Those clauses of the IEA have been considered before in the Authority<sup>2</sup> as well as very recently in the Employment Court in the case of *G L Freeman Holdings Limited v Livingston*.<sup>3</sup> The issue before the Court in Ms Livingston's case, which is the issue relevant to Ms Sun's case, is whether G L Freeman was entitled to withhold money from Ms Livingston because she failed to give an agreed period of notice.

[61] Judge Couch found that it needed to be established whether the forfeiture provision in clause 12.1 was liquidated damages, being a genuine pre-estimate of damages likely to be suffered for Ms Livingston breaching that term of the contract, or was more properly viewed as a penalty provision. Such a provision is not enforceable if the amount withheld is *disproportionate to the injury*<sup>4</sup> and so amounts to a penalty.

[62] There is no evidence in Ms Sun's case that her resignation left G L Freeman out of pocket. In her case, as in Ms Livingston's case, clause 12.1 operates as an unenforceable penalty provision.

[63] **G L Freeman owes Ms Sun \$811.34 gross for unpaid final holiday pay and \$591.60 gross for unpaid alternative holiday pay.**

**Should interest be paid on the unpaid sums due to the employees?**

[64] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.<sup>5</sup>

[65] There were no legal grounds for money to be withheld. The money should have been paid to the employees who were entitled to the use of it from the date of the termination of their employment.

[66] I consider it reasonable and fair that each of the employees is paid interest on the amounts ordered to be paid to Ms Belley from the date of termination of their employment with G L Freeman at 5% per annum until the date the amounts are paid in full.

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<sup>2</sup> *McDonald v G L Freeman Holdings Ltd* [2015] NZERA Christchurch 52, *Paengkam v G L Freeman Holdings Ltd* [2013] NZERA Christchurch 235 and *Livingston v G L Freeman Holdings Ltd* [2013] NZERA 90.

<sup>3</sup> [2015] NZEmpC 120, 24 July 2015, Judge A A Couch.

<sup>4</sup> *Todd Law of Contract in New Zealand* (4<sup>th</sup> ed, LexisNexis, Wellington) at 888.

<sup>5</sup> Judicature (Prescribed Rate of Interest) Order 2011.

**Did G L Freeman breach provisions of the Holidays Act, the Minimum Wage Act and the Wages Protection Act 1983?**

[67] I am satisfied that G L Freeman breached:

- Section 27 of the Holidays Act in not paying any of the four former employees their annual leave entitlements at the end of their employment.
- Section 60 of the Holidays Act in not paying Ms Singh or Ms Sun for their alternative holidays not taken at the end of their employment.
- Section 65 of the Holidays Act in not paying Ms Singh sick pay for the days she was sick.
- Section 6 of the MW Act for not paying Ms Singh for her last two days of work.
- Sections 4 and 5 of the Wages Protection Act 1983 mean that an employer cannot make deductions from an employee's pay without the written consent of or a written request from a worker. This provision was breached in relation to all four former employees.

**Should a penalty be imposed and, if so, in what amount?**

[68] The Authority's power to order a penalty is discretionary.

[69] In *Xu v McIntosh*<sup>6</sup> the Employment Court provided guidance to the Authority when considering imposing penalties. It made the following observations:

*A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*

*The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*<sup>7</sup>

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<sup>6</sup> [2004] 2 ERNZ 448

<sup>7</sup> Ibid, Paragraphs [47] and [48]

[70] The following non-exhaustive list of factors is useful to consider in exercising the Authority's discretion about whether or not to impose a penalty and if it is to be imposed, what amount should be ordered to be paid. I will look at:

- the seriousness of the breach;
- whether the breach is one-off or repeated;
- the impact if any on the employees, including considering the vulnerability of the employees;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.<sup>8</sup>

[71] I consider each of the breaches to be moderately serious but not at the extreme end of the spectrum. In Ms Green and Ms Morriss' cases G L Freeman was well aware that it should pay them for the reinstated annual leave and did not do so purely because it considered it unfair, despite it being Ms Green's and Ms Morriss' entitlement. G L Freeman also acknowledged that it owed Ms Singh money but did not voluntarily pay her anything. G L Freeman ought to have known that the penalty clause in Ms Sun's IEA was unlikely to be enforceable.

[72] The breaches of failing to pay holiday pay and alternative holiday pay at the end of employment are repeated breaches not just in these cases but in earlier cases referenced above.

[73] The impact on each employee was significant, although none of them are particularly vulnerable employees, by way, for example, of being here on temporary working visas. However, they were in modestly paid roles and are not of significant financial means. They have been deprived of money that is rightfully theirs, they have had to use the services of the Labour Inspector and give their own time to make written statements and to appear at the investigation meeting. Ms Sun has incurred legal costs of \$480 plus GST to no effect as her lawyer was not able to get G L Freeman to pay her what she was owed.

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<sup>8</sup> *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

[74] There is need for a penalty to be imposed by way of specific deterrence for G L Freeman as an employer as it may well operate other business venture in the future. It is important to recognise that the majority of employers comply with their obligations and ensure that their employees receive their statutory entitlements. However, there is need for penalty as a signal to act as a more general deterrence for some other employers, or perhaps an encouragement for them to continue to or to start to pay employees their minimum entitlements.

[75] G L Freeman acknowledged that it owed Ms Singh some money although it did not pay her. That does not amount to remorse and in the other cases there was no remorse at all.

[76] Ms Tait referred me to a number of what she submits are comparable cases in which the Authority has imposed penalties. She submits that it is appropriate to either impose a penalty for each failure because in each former employee's case the situation is different or to impose a global penalty for all breaches.

[77] Ms Tait submits that the failures in relation to Ms Singh and Ms Sun are more serious than those in relation to Ms Green and Ms Morriss. She says that is the case because G L Freeman was on notice because of the *McDonald*, *Paengkam* and *Livingston* cases<sup>9</sup> in the Authority that its use of section 12.1 to withhold holiday pay was likely not justifiable. I accept that there had been repeated Authority decisions against G L Freeman on that score. G L Freeman challenged Ms Livingston's case and sought a de novo hearing by the Employment Court. That hearing was held on 24 March 2014 which was after Ms Paengkam's case but before Ms McDonald's case.

[78] A prudent employer would not have continued along the track of relying on a clause in an IEA that had been found to be unenforceable already. However, I am reluctant to find that to be an aggravating feature tending towards a heavier penalty for the reason that prior to Judge Couch's decision in the *Livingston* case on 24 July 2015 the Authority's decisions, albeit in relation to other employers than G L Freeman, were not entirely consistent. Even Judge Couch's recent decision does not mean that clauses such as 12.1 of the G L Freeman IEA will always be found to be unenforceable. There are circumstances in which such a clause could be justified and enforceable. However, in none of the cases against G L Freeman has it been found to

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<sup>9</sup> Full references in footnote 2.

be so and it would have been unlikely to have been for most of the kinds of employees G L Freeman had attempted to apply it to; being receptionists, cleaners and waiting staff at the Redwood Hotel.

[79] I consider that it is appropriate to impose a global penalty for the breaches of the Holidays Act and the breach of the MW Act. I acknowledge the breaches of the Wages Protection Act too but consider that it is not appropriate to impose a penalty for those breaches on top of the other breaches which amounted to the same result for the employees.

[80] Having taken into account all the factors above as well as the fact that the maximum penalty for each breach of the legislation is \$20,000 for a company as an employer I impose a penalty of \$15,000 with \$500.00 of that amount to be paid to Ms Sun and \$14,500 to be paid to the Employment Relations Authority for transfer to the Crown Account.

#### **Costs**

[81] G. L. Freeman Holdings Limited must reimburse the applicant the cost of the filing fee of \$71.56.

Christine Hickey  
Member of the Employment Relations Authority