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THE ADVOCATE

ISSUE
344
November 2023

a regular newsletter for clients of
mcphail gibson & zwart ltd

When Employees Fail to Give Notice

Two recent Employment Relations Authority cases feature employers pursuing employees for failure to give the requisite notice of termination of their employment. One employer relied on a forfeiture clause and was unsuccessful. The other employer relied on a pure breach of contract claim and was successful. We discuss each case in turn below.

In *Caleys Limited v Deadman*, Ms Deadman was employed as a sales representative by Caleys Limited ("**Caleys**"). She resigned on 21 November 2022, with an effective termination date of 22 November 2022. Ms Deadman's employment agreement provided that if she did not give one month's notice of resignation, she would forfeit one month's salary (a forfeiture clause).

The Authority noted that the law, "*recognises that [forfeiture clauses] are generally unenforceable against employees for failure to work their notice period unless the employer has suffered an actual loss. This is because forfeiture clauses are considered as imposing a penalty rather than recovering a loss to the employer.*"

Caleys argued that, because of Ms Deadman's failure to give notice, it had to divert her work to the sales manager and company director, which meant that both had to work additional hours outside of their normal hours. Caleys argued that this cost the business $7,040.00, though if another sales representative had been available to undertake the work, then the cost would be more closely aligned with one month of Ms Deadman's salary, which it claimed at the Authority.

Ms Deadman argued that she was unable to fulfil her duties because she suffered from vertigo. She disclosed her health issues to Caleys before her employment started. Once she commenced employment, she noted that the work environment was not conducive to her learning and due to vertigo and work-related stress, her health began to suffer. She later resigned as a result.

The Authority noted that the Employment Court in *GL Freeman Holdings Ltd v Livingston* accepted that whether an employee resigns on notice or not, the employer will always incur costs, including hiring and training costs. In *GL Freeman Holdings*, the Court found that the employer did not suffer any actual loss and the equivalent of the employee's wages for the notice period was not recoverable.

Caleys did not provide any clear and verifiable evidence of its loss following Ms Deadman's resignation. Further, even if Ms Deadman had not resigned, it was unlikely she would have been able to carry out all of her duties and would have required additional resourcing support from Caleys. The Authority held that the forfeiture clause was not a genuine assessment of loss and was therefore unenforceable.

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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This is a very different outcome from *Canterbury Waterblast Limited v Stewart*, where the Authority awarded damages against an employee who abandoned his employment.

Mr Stewart was employed as a truck driver-water blaster by Canterbury Waterblast Limited (CWL). He commenced employment in December 2022. Shortly thereafter he completed a Dangerous Goods and Class 4 truck driving course ("**Course**"). There was a bond clause in Mr Stewart's employment agreement, which provided that if he left employment within two years the employer could claim costs on a pro-rata basis. His employment agreement also provided a clause that allowed for deductions from his wages for unreturned company property.

CWL closed down for the Christmas period. However, Mr Stewart was rostered to work for one day during this period. He was paid in advance his wages for this day and the statutory holidays. Mr Stewart did not work the rostered day and did not report for work when CWL reopened on 9 January 2023. He texted CWL advising he had a sore throat and then texted again the next day to advise that he had Covid-19. He did not contact CWL again, despite CWL making various attempts to contact him.

CWL's Director later saw Mr Stewart driving around in his former employer's truck. He sent Mr Stewart a text message that said: *We take it you are not coming back. Can we get the phone and uniform back please*." Mr Stewart did not respond and so CWL emailed him an invoice for the costs of the Course, his uniform and the company phone. Mr Stewart agreed to return the uniform and phone but refused to pay the Course costs.

CWL engaged a debt collection agency, however this did not resolve matters. Mr Stewart did not return the phone or uniform. He became abusive in email correspondence with CWL. CWL then filed in the Employment Relations Authority claiming reimbursement of the Course costs, reimbursement of the costs of the phone and uniform, and repayment of the wages Mr Stewart was paid in advance and did not work for. Mr Stewart did not engage in the Authority's proceedings.

The Authority determined that the relevant obligations under Mr Stewart's employment agreement were binding and enforceable. The Authority also noted that Mr Stewart breached his obligation to provide one week's notice when he abandoned his employment.

Further, the Authority said that the content of Mr Stewart's text messages "*displayed an inexplicably belligerent and finally abusive attitude, in response to requests to meet his obligations to CWL*."

Mr Stewart was entitled to be paid for the statutory holidays. However, because Mr Stewart did not work a day he was rostered to work (and was paid in advance for) and later abandoned his employment, the Authority considered it "*equitable*" that Mr Stewart pay five days' pay for his abandonment and failure to work out his agreed notice period ($864.00). Mr Stewart was also ordered to pay the costs of replacing his work phone ($253.26), the Course costs ($1,035.00), uniform costs ($607.29), and reimbursement of the Authority's filing fee ($71.56).

These two cases illustrate the difference between pursuing an employee in reliance on a forfeiture clause and pursuing an employee for a breach of their employment agreement. It is not clear whether the Authority had jurisdiction to award damages equating to five days' pay against Mr Stewart. However, given the amount awarded this case is not likely to be challenged to the Employment Court.

No Trial Periods for Accredited Employer Work Visa Employees

Immigration New Zealand has made a new rule that Accredited Employers are no longer allowed to use 90-day trial periods in employment agreements when hiring staff on an Accredited Employer Work Visa ("**AEWV**").

Immigration New Zealand has said that, *"This is to encourage accredited employers to treat migrants fairly, and only recruit someone when they have a genuine labour need or skills gap to fill*".

From 29 October 2023, any AEWV Job Check application will be declined if the employment agreement includes a 90-day trial period, or Immigration New Zealand may request updated information. This rule will not apply to:

- Applications based on Job Checks approved before 19 October 2023; or
- Migrants who already hold or have applied for an AEWV based on a job check that was approved prior to 29 October 2023.