

Employment Court Endorses Banning Order

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In 2016, Parliament passed a series of employment law changes which related to the stricter enforcement of minimum employment standards.¹ One of these changes was the introduction of banning orders and pecuniary penalties for employers who had persistently breached minimum employment standards.

Last month, the Employment Court in *Labour Inspector v Victoria 88 Limited T/a Watershed Bar and Restaurant*² endorsed orders under these new provisions. As a result of the judgment, the employer company and its director are now banned from hiring employees for three years, in addition to paying a heavy financial penalty for persistent breaches.

Factual Background

The second defendant, Gordon Freeman, was the sole director and shareholder of the first defendant company, Watershed. Mr Freeman owned other companies which had previously been found by the Employment Relations Authority and Employment Court to have breached employment law by withholding pay through unlawful ‘forfeiture of wages clauses’ in employment agreements. In this case, Mr Freeman directed Watershed to make deductions from the wages of two employees under similar forfeiture clauses in their employment agreements. The deductions involved withholding holiday pay owed to the employees at the end of their employment.

The matter was referred to the Labour Inspector, who commenced an investigation and filed proceedings against both Watershed and Mr Freeman. However, before the application was heard in Court, the parties reached an arrangement and requested that the Court essentially endorse their agreement by granting the orders and penalties they had agreed. The Court accepted the request of the parties.

Declaration of Breach

The parties agreed, and the Court declared, that Watershed had breached a minimum entitlement provision of the Holidays Act by “*failing to pay holiday pay owed ... on the*

¹ Employment Relations Amendment Act 2016, s 19.

² [2018] NZEmpC 26.

termination of employment". The parties also agreed that Mr Freeman, "*was a person involved in a breach of a minimum entitlement provision ... in that he knowingly directed [Watershed's] failure to pay holiday pay*".

Banning Orders and Pecuniary Penalties

The seriousness of this breach of minimum standards was reflected in the following orders made by the Court:

- Banning orders were made so that Watershed is prohibited from entering into any employment agreements as an employer for three years. Mr Freeman was also banned from entering into an employment agreement as an officer of an employer or being involved in the hiring of employees for three years.
- Each defendant was ordered to pay a pecuniary penalty of \$10,000. Due to the financial circumstances of the Watershed, Mr Freeman was to pay the entire amount of \$20,000.

In arriving at the pecuniary penalty, the parties and the Court considered factors including: the nature and number of breaches; the assessment and severity of breaches for each defendant; mitigating factors; the financial circumstances of the parties; and the proportionality between the breach and the award.

While the decision expressly states that it should not be regarded as having precedential value because the parties agreed the outcome, it is one of the first examples of banning orders and pecuniary penalty orders being discussed judicially and applied in practice. It is likely that the Court will now see further such applications.