IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2024] NZEmpC 209
EMPC 429/2024

IN THE MATTER OF	an application for a freezing order and ancillary orders
BETWEEN	WHARE MANAAKI INCORPORATED trading as PORIRUA WOMEN'S REFUGE Applicant
AND	KYLIE ANDERSON First Respondent
AND	JUDITH CRESTANI Second Respondent
AND	JAN LOVE Third Respondent
AND	ANZ BANK OF NEW ZEALAND LIMITED Fourth Respondent
AND	ASB BANK LIMITED Fifth Respondent
AND	BANK OF NEW ZEALAND Sixth Respondent
AND	KIWIBANK LIMITED Seventh Respondent

Hearing:	25 and 31 October 2024 (Heard by telephone)
Appearances:	C Reiger and S Balloch, counsel for the applicant No appearance for the respondents
Judgment:	5 November 2024

JUDGMENT OF JUDGE J C HOLDEN
(Application for freezing and ancillary orders)

[1] This judgment resolves a without notice application for a freezing order and ancillary orders, and for directions as to service.

[2] The application was filed urgently late on 25 October 2024. At that stage, I was not satisfied that the circumstances justified a freezing order, but the application was adjourned to allow the applicant to file more evidence in support of its application. It did so on 30 October 2024.

[3] The applicant, Whare Manaaki, is an incorporated society governed by a collective of members, which operates as a charitable organisation, providing immediate crisis response and emergency housing to women and children who are victims of domestic violence. The first, second and third respondents are former employees of Whare Manaaki. The other respondents are banks where the former employees have accounts.[1]

[4] The former employees were all summarily dismissed by Whare Manaaki for serious misconduct on 17 October 2024. The allegations made against them, and the conclusions reached by Whare Manaaki, are strongly contested. The former employees have made personal grievance claims for unjustifiable disadvantage in respect of Whare Manaaki's process and for unjustifiable dismissal in respect of their dismissals.

[5] The application is supported by affidavit evidence. Also filed was a memorandum, a draft order and an undertaking as to damages. I have no reason to conclude that the undertaking cannot be relied on.

[1] There is an issue as to whether the banks are properly named as respondents, but it has not been necessary to resolve that issue.

[6] Consistent with counsel's duty to the Court, Ms Rieger, counsel for Whare Manaaki, identified possible defences on which the former employees might rely, including any facts that would support their positions.

[7] I have considered the application and the evidence provided but, for the reasons set out in this judgment, have concluded that there is insufficient basis for freezing and ancillary orders to be made. The application is therefore dismissed.

Relevant principles

[8] Section 190(3) of the Employment Relations Act 2000 provides that the Court has the same powers as the High Court to make a freezing order, as provided in the High Court Rules 2016.

[9] The Court applies pt 32 of those rules, with appropriate modifications.

[10] The purpose of a freezing order is to preserve property for enforcement purposes in circumstances where there is a risk of dissipation.

[11] This means that a freezing order may be made under r 32.2, which includes the possibility that the Court may make such an order without notice, albeit subject to full and frank disclosure to the Court of all material facts.

[12] Rule 32.5 provides that the Court may make a freezing order against a respondent if an applicant has a good arguable case on a prospective cause of action. The allegations in relation to a proposed claim must be capable of tenable argument, supported by sufficient evidence.[2] The cases emphasise that the sufficiency of evidence required must reflect the early stage of the proceeding.[3] Thus, an order may be made if there is a sufficiently plausible foundation established for the substantive claim, but the Court should not engage in speculation.[4]

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2 *Hannay v Mount* [2011] NZCA 530 at [21]–[22].

3 *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, (2014) 22 PRNZ 479 at [31], citing *Hannay v Mount*, above n 2; and *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754.

4 See *Wing Hung Printing Co Ltd v Saito Offshore Pty* Ltd, above n 3, at [41], aff'd *Hannay v Mount*, above n 2, at [21].

[13] Ancillary orders may be made if the Court considers it just to do so, including to elicit information relating to assets relevant to the freezing order.[5]

[14] In order to obtain such orders, the applicant must satisfy four essential requirements:[6]

(a) that it has a good arguable case;

(b) that the respondents have assets within the jurisdiction;

(c) that there is a real risk the property will be dissipated or, if relevant, will be moved out of the jurisdiction; and

(d) that the balance of convenience and interests of justice require the grant of interim relief.

[15] There must be a proceeding within the jurisdiction of the Court or the Authority to which the application for freezing orders relates. If substantive proceedings to which the order can relate have not been able to be issued because of urgency, generally such proceedings will be required to be filed as soon as possible after the order is made and before it is sealed.[7]

[16] The freezing order jurisdiction is flexible.[8] Nevertheless, a freezing order is draconian in the sense that it is an intrusion on the ability of the party whose assets have been frozen to freely deal with their property.[9]

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5 High Court Rules 2016, r 32.3.

6 *A Labour Inspector v Taste of Egypt Ltd* [2016] NZEmpC 31, [2016] ERNZ 309 at [13]–[23], citing *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (EWCA); *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 168 at [25]; and *A Labour Inspector of Ministry of Business Innovation and Employment v Jeet Holdings Ltd* [2019] NZEmpC 188 at [5].

7 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 8.

8 *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 548; and *Official Assignee v Scott* [2012] NZHC 2579 at [23].

9 *Saomai v Prestige Demolition Services Ltd* [2016] NZEmpC 18 at [33]; and *Kang v Saena Co Ltd* [2022] NZEmpC 36 at [48].

[17] Freezing orders are not designed as a tool to enable a claimant to secure a fund against future success.[10] Nor are they intended to give the claimant an advantage or preference over other creditors of the respondent.[11]

[18] It is not enough for a claimant to assert a belief that a respondent will dissipate its assets; there must be solid grounds justifying that belief.[12] Mere suspicion will not be sufficient.[13]

Whare Manaaki says the evidence supports orders

[19] The evidence filed by Whare Manaaki was detailed and included extensive correspondence between the parties' representatives. I am, however, conscious that this is a without notice application and I have not heard from the former employees or their representative who strongly refute the allegations made about them. For that reason, I have limited my references to evidence necessary for the purposes of this judgment.

[20] The former employees were all employed full-time by Whare Manaaki until their dismissal. Kylie Anderson was employed as the Team Leader from July 2023, Judith Crestani was employed as the Agency Co-Ordinator from May 1992, and Jan Love was employed as the NGO Co-Ordinator from February 2022. Ms Crestani and Ms Love reported to Ms Anderson.

[21] Whare Manaaki is a member of the National Collective of Independent Women's Refuges (NCIWR). The NCIWR commenced an investigation into Whare Manaaki's affairs in April 2024 and, as a result of that investigation, raised concerns about potential misuse of Whare Manaaki's funds. At that stage, the concerns revolved around the operation of a "wellness fund" pursuant to which the former employees had received reimbursement for non-work-related expenses, which were said to have been paid without the requisite financial delegation.

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10 *Shen v An Ying Group Ltd (No 3)* (2006) 3 NZCCLR 351 (HC) at [77]; and *Kang v Saena Co Ltd,* above n 9, at [48].

11 *Official Assignee v Scott*, above n 8, at [24].

12 *Miyamoto International New Zealand Ltd v Foster Street Properties Ltd* [2015] NZHC 3086 at [23(c)]. See generally *Raukura Moana Fisheries Ltd v The Ship Irina Zharkikh* [2001] 2 NZLR 801 (HC) at [122], aff'd *Murren v Schaeffer* [2018] NZCA 318, (2018) 24 PRNZ 285 at [16].

13 *Euro-National Corp Ltd v NZI Bank Ltd* (1991) 4 PRNZ 365 (HC) at 372.

[22] The raising of those concerns by the NCIWR led Whare Manaaki to commence its own employment investigation. The former employees were suspended from the workplace pending the outcome of that investigation. At NCIWR's recommendation, Deloitte New Zealand was also engaged to undertake a forensic investigation into the allegations of mismanagement of funds. Those investigations are ongoing.

[23] Other matters of concern arose and also were investigated by Whare Manaaki in its employment investigation and ultimately, as noted, the former employees were dismissed on 17 October 2024 for serious misconduct.

[24] From early on in the investigation, the former employees have been represented by counsel and concerns have been raised by them regarding the way in which the former employees have been treated. A personal grievance for each of the former employees was raised in September 2024 in respect of matters up to that date. Further concerns were raised by the solicitors acting for the former employees after that date, and the former employees have provided lengthy responses to the various allegations made against them.

[25] Personal grievances in respect of the former employees' dismissals were raised by way of letter dated 30 October 2024. In that letter counsel for the former employees advised that he was instructed to prepare an application for interim reinstatement and was in the process of doing that.

[26] Following the dismissal of the former employees, Whare Manaaki began to process their final pay, which included calculating their holiday pay entitlements.

[27] It was at that stage that Whare Manaaki focused on the accumulation and taking of time off in lieu (TOIL), which it says appeared to be in breach of Whare Manaaki's TOIL policy which provides that TOIL is to be taken within one month of it being accrued. Whare Manaaki says this led to the annual leave balances being higher than they ought to be. Because of its concerns and because of the ongoing Deloitte audit, Whare Manaaki wrote to the former employees advising that it was concerned that the leave balances recorded were not an accurate reflection of their annual leave

entitlement because annual leave had not been applied for and processed when it should have been and, accordingly, these balances were in dispute.

[28] Whare Manaaki advised that it was conscious of its obligations to process the former employees' final pay and proposed that, in order for Whare Manaaki to discharge its obligations in that regard, payments would be made into the former employees' solicitors' trust account, with an undertaking that the final holiday pay would not be paid out until the conclusion of the forensic investigation and a proper assessment of the amounts owing had been completed.

[29] Counsel for the former employees advised that they did not agree to that arrangement and that if Whare Manaaki failed to comply with its statutory obligations in respect of holiday pay, they would pursue compliance action along with interest on non-paid moneys and penalties for breach of s 27 of the Holidays Act 2003 and s 4 of the Wages Protections Act 1983.

[30] Whare Manaaki felt compelled to comply with what it understood its obligations to be and so, contemporaneously with filing its application for freezing orders, it made payment to the former employees of the amounts recorded, as set out above.

[31] It does not dispute that there was a TOIL policy which would have given rise to some entitlement to TOIL for the former employees; it also does not dispute that there would be some holiday pay to the former employees. It says, however, that the amounts are likely overstated in the records.

No draft proceedings have been provided

[32] A statement of problem has yet to be filed and no draft statement of problem has been provided to the Court. Previous cases have recognised, however, that it may not be necessary for a statement of problem or draft statement of problem to be filed in support of an application seeking freezing and ancillary orders which is being heard under urgency.[14]

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[14] "Employment Court of New Zealand Practice Directions", above n 7, at No 8; *BD v FG* [2022]

There is a good arguable case

[33] Matters are still under investigation. Nevertheless, on the material before me I am satisfied that Whare Manaaki has a good arguable case that the former employees have received payments to which they are not entitled, in breach of the express and implied terms of their employment agreements.

There are assets within the jurisdiction

[34] The requirement that there be assets within the jurisdiction is satisfied. The assets the applicant seeks to be frozen are New Zealand bank accounts held by the former employees.

There is only limited evidence of a risk of dissipation

[35] Whare Manaaki says that it is concerned that there is a real and credible risk that the former employees could take steps to move or dissipate the funds paid to them as holiday pay, if the freezing orders are not made.

[36] It notes that the former employees have instructed counsel since around June 2024 and will have incurred significant legal expenses. It says it is concerned that the funds, paid at the conclusion of the employment, including that paid as holiday pay, could be used to settle any outstanding account with the solicitors.[15]

[37] It points to the former employees declining the proposal that the funds be paid into their solicitors' trust account, with a solicitor's undertaking.

[38] Whare Manaaki also notes that there has been some media reporting regarding the concerns and that, as a result, the former employees may find it difficult to obtain employment in New Zealand, which increases the risk that they will relocate overseas. It acknowledges, however, that the risk is remote.

NZEmpC 94 at [4]; and *A v B* [2021] NZEmpC 118 at [36].

[15] Related to the raising of the personal grievances, which the applicant submits would not be captured by High Court Rules 2016, r 32.6(3)(b).

[39] Whare Manaaki notes that it is a charitable organisation, which relies on funding for its operations and that it is not in a position to lose substantial sums of money, nor does it have funds to pursue proceedings to recover any loss.

[40] Counsel for Whare Manaaki has submitted that the prima facie evidence of financial mismanagement also goes a considerable way to establishing that the funds would be at risk of dissipation.[16]

[41] The difficulty is that the risk of dissipation has little evidential foundation. While the response from counsel for the former employees regarding the payment of their final pay into a trust account, may have been disappointing to Whare Manaaki, it was a response that was open to the former employees, and Whare Manaaki made payment notwithstanding the lack of an undertaking.

[42] The submission in respect of legal fees essentially amounts to a suggestion that, should Whare Manaaki be successful in getting orders to recover any of the holiday pay paid out to the former employees, that debt should get priority over any outstanding account with their solicitors. That is not an appropriate basis for a freezing order.

[43] Finally, the suggestion that the former employees may relocate overseas is speculative and I disregard it. In any event, the concerns raised as to recovery are not in and of themselves a proper basis for a freezing order.

[44] In short, I am not satisfied that the Court is able to draw adverse inferences from the evidence provided that can be used as a basis for making the freezing and ancillary orders sought.

[45] Accordingly, I am not satisfied to the requisite standard that there is a risk that any decision ultimately made in favour of Whare Manaaki will be wholly or partially unsatisfied because relevant assets may have been disposed of, dealt with or diminished in value.

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[16] Counsel did not suggest that the actions of the former employees amounted to fraud but drew an analogy with *MNO v PQR* [2023] NZEmpC 109 at [25].

[46] For that reason, the application cannot succeed.

Balance of convenience and interests of justice do not favour orders

[47] I also am not satisfied that the balance of convenience and interests of justice support the making of a freezing order.

[48] In the present circumstances, the actions of concern to Whare Manaaki have not been hidden from view; they are recorded in the records of Whare Manaaki. The case is different from many that come before the Court where the employee or former employee has secretly established a separate business to which it has diverted funds or business opportunities, or where the employee or former employee has surreptitiously diverted moneys from the employer to personal bank accounts.

[49] I also take into account that the issues between Whare Manaaki and the former employees have been the subject of ongoing communications between counsel with extensive correspondence and unresolved personal grievances.

[50] In those circumstances, I question the appropriateness of making without notice orders of the kind now sought.

[51] I also consider the position of the respondents who may suffer inconvenience, if not hardship, by the making of a freezing order. I accept the submission that such hardship may be mitigated by the provision in the draft freezing order for the former employees to each be able to access $500 per week from their bank accounts. Nevertheless, they will be adversely impacted by their not being able to otherwise access their bank accounts.

[52] While I recognise Whare Manaaki's concerns, I do not accept that interests of justice or the balance of convenience favour the orders sought, which is another reason why the application is dismissed.

[53] The application was made without notice to the respondents. Counsel for Whare Manaaki is to provide this judgment to them immediately. Unless otherwise ordered by the Court, it may be published seven working days following today's date.

[54] There is no order as to costs.

J C Holden
Judge

Signed at 4.30 pm on 5 November 2024