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FAJ v GEK [2025] NZEmpC 45 (14 March 2025)

Last Updated: 27 March 2025

ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2025\] NZEmpC 45](#)
EMPC 106/2025

IN THE MATTER OF	a without notice application for freezing and ancillary orders
BETWEEN	FAJ Applicant
AND	GEK First Respondent
AND	HIL Second Respondent

Hearing: On the papers
Appearances: W Fotherby and M Kilkelly, counsel for applicant
Judgment: 14 March 2025

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS (Application for freezing and ancillary orders)

Introduction

[1] The applicant has applied without notice for freezing and ancillary orders against the first and second respondents.

[2] Draft proposed orders have been filed, together with an undertaking as to damages supported by affidavit evidence as to the applicant's financial ability to meet any order for damages pursuant to the undertaking.

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[3] Counsel for the applicant has fully set out the grounds and information on which the application relies, including any defence that might be relied on by any other party, or any facts that would support the position of any other party.

[4] I am satisfied, based on the material before the Court, that it is appropriate to proceed to deal with the application on a without notice basis. The (untested) affidavit evidence supports the existence of a real risk that proceeding on notice would cause unnecessary delay and/or lead to the dissipation of assets.

Interim non-publication orders

[5] I consider it appropriate to make interim orders of non-publication over the name and identifying details of the first and second respondents. They have not had an opportunity to be heard (given that this application is proceeding on a without

notice basis) and the judgment contains material that is likely to damage their reputations. As the full Court recently observed in *Spiga*, both the Court and the Employment Relations Authority have broad powers to make orders of this sort, including (where appropriate) on their own initiative.¹ While the applicant has not sought such orders, I consider them to be in the interests of justice. Naming the applicant would effectively identify the first and second respondents. For this reason the order will extend to the name and identifying details of the applicant.

[6] There is accordingly an interim order prohibiting publication of the names and identifying details of the parties. There must be an exception, however, to allow the freezing and ancillary orders to be effected. The non-publication order will therefore not prevent the applicant from identifying itself and the respondents to those entities and individuals named in the freezing and ancillary orders.

Framework for analysis

[7] The Employment Court may make freezing and ancillary orders, and has the same powers as the High Court as provided in the [High Court Rules 2016](#): s 190(3) of

¹ *MW v Spiga* [2024] NZEmpC 147, (2024) 20 NZELR 723 at [90] and [242]-[243].

the [Employment Relations Act 2000](#).² An application must be advanced in the Employment Court because the Employment Relations Authority has no power to make such orders.³

[8] There are a number of hurdles that must be overcome by an applicant.

[9] First, there must be a proceeding within the jurisdiction of the Court or the Authority to which the application relates. I return to this issue below.

[10] Second, a written and signed undertaking as to damages must be filed with the application, and evidence provided (via affidavit/s) of the applicant's financial ability to meet an order for damages pursuant to the undertaking. As I have said, these steps have been taken.

[11] Third, a draft order must be filed which refers to the undertaking as to damages. This too has been complied with by the applicant.

[12] Fourth, the applicant must show:

- (a) a good arguable case on a cause of action;
- (b) there are assets of the respondent to which the order can apply;
- (c) there is a real risk of dissipation.

[13] The need to protect the applicant from a barren determination must be balanced against any prejudice or hardship to the respondent and/or third parties. Consideration must be given to the overall interests of justice.

[14] Once made, a freezing order restrains a party from removing assets located in or outside New Zealand, or disposing, dealing with, or diminishing the value of those assets.

² [High Court Rules 2016](#), rr 32.2 and 32.3; [Employment Relations Act 2000](#), s 190(3).

³ [Employment Relations Act 2000](#), s 160(4).

Background

[15] The background emerges from the affidavit evidence filed in support of the application and can be summarised as follows.

[16] The applicant company operates a vehicle servicing and repair shop, specialising in performance and modified cars. The first respondent owns a 33.3 per cent share in the company; LJB (who has sworn an affidavit in support of the application) owns the remaining stake in the company.

[17] The first respondent entered into an employment agreement which described their role as Head Mechanic. As Head Mechanic they were responsible for the day-to-day onsite management of the company and associated duties. They were given a significant degree of autonomy in terms of how the workshop was run, which included purchasing parts and supplies through the company's accounts with various suppliers; engaging contractors to perform services in the workshop; use of a business debit card and EFTPOS card, which were connected to the company's bank account, and, more latterly,

access to two fuel cards. The first respondent also had responsibility for dealing with clients and related administration (including ordering parts and arranging servicing). As part of this process, the first respondent was meant to fill out a "customer job sheet", which would record what the customer wanted and what parts were needed. They were then to review the job sheet and convert it into a quote through the company's Xero accounting software. The first respondent would then invoice the customer through Xero. The payment would then be received in the company business account before the customer collected their vehicle. The first respondent also had the ability to edit, cancel or void invoices as they saw fit.

[18] The first respondent's employment agreement contained a number of provisions, including as to the use of confidential information, conflict of interest, and non-competition. The first respondent was also subject to the ordinarily implied terms of fidelity, trust and confidence, and the statutory duty of good faith.

[19] LJB says that from the outset concerns existed about the first respondent's approach to financial matters, including charges to the company's business account

that appeared unrelated to the business. The concerns were reinforced when the company's accountants had difficulty reconciling the accounts. The accountants requested that the first respondent provide them with their personal bank statements to assist with the reconciliation process. An initial review suggested that the first respondent had not been forwarding all money received from customers to the company's account and that other accounts were being used to hold company money, including at least one account of the second respondent.

[20] Informal attempts to resolve matters were unsuccessful and the relationship between LJB and the first respondent broke down. LJB injected funds into the business to ensure that it remained solvent. The workshop was shut down and the first respondent's employment came to an end around 21 January 2025. LJB says that the first respondent removed a quantity of tools, assets, and consumables (including the company loan car) from the company premises and has since become aware that a number of those items have been sold on TradeMe.

[21] LJB commenced a detailed investigation into the company's account. The investigation identified a large number of transactions on the company account from the first respondent's card that appeared to have no obvious business purpose, or which may have had a potential business purpose, but which were not properly recorded and/or charged to any clients on the company's invoices. The details are set out in a schedule annexed as an exhibit to LJB's affidavit filed in support of the application.

[22] The investigation is also said to have thrown up concerns about the misuse of two fuel cards connected to the business. On the face of it, and having regard to the purpose for which the cards were to be used, the amounts charged to the cards appear very high.

[23] Further discrepancies were identified in respect of the company's accounts with a number of suppliers, with orders containing no customer reference and which appear to have been used for the first respondent's personal use. There are currently substantial debts owing to suppliers as a result of these charges, which require further analysis.

[24] There is documentary and other evidence before the Court that supports the applicant's concern that the first respondent directed payments for work carried out through the company to their own personal bank account and that of the second respondent. It is estimated that at least \$85,822.25 of customer payments have been paid into the first respondent's personal account, with only \$36,257 having been passed on to the company account, leaving \$49,565.25.

[25] Finally, there is evidence that the first respondent has been taking steps to sell off certain assets. This is supported by evidence of payments made for advertisements placed on TradeMe and LJB's personal knowledge that company tools have been sold onto their acquaintances.

Good arguable case

[26] I am satisfied, on the basis of the evidence currently before the Court, that there is a good arguable case that the first respondent has used their position as Head Mechanic for their own personal gain, through the misuse of business and supplier accounts, diverting money into their own and the second respondent's accounts, and converting company property. There is a good arguable case that the first respondent has breached various contractual and implied terms of their employment agreement, including as to their obligation of good faith, fidelity, trust and confidence.

[27] The second respondent was not an employee of the company. However, and as r 32.4 makes clear, the Court may make freezing and ancillary orders against respondents who are not party to the proceedings themselves.⁴

[28] There is evidence before the Court that the second respondent allowed and/or facilitated the first respondent's use of their bank account for the purposes of accepting payments that should have been made to the company, and I am satisfied that orders should appropriately extend to the second respondent in the circumstances.

[29] I now return to the issue of jurisdiction. Counsel for the applicant acknowledges that there may be issues in respect of correct forum for pursuit of the

4 See to r 32.5.

claim, having regard to the dual role of the first respondent as employee (Head Mechanic) and director.

[30] While issues have previously arisen in respect of correct jurisdiction for employee theft against an employing company, the Supreme Court has clarified that it lies with the employment institutions.⁵

[31] The case against a respondent needs to be capable of tenable argument and supported by sufficient evidence, bearing in mind the early stage at which the application is brought.⁶ I accept that a good arguable case exists, supported by evidence currently before the Court, including what has been thrown up by investigations to date.

Risk of dissipation?

[32] The company is required to provide evidence that a danger exists that a prospective judgment will be wholly or partly unsatisfied because the assets of the prospective judgment debtor might be removed from New Zealand or disposed of, dealt with, or otherwise diminished in value.

[33] In assessing this risk the following question is helpfully asked: are there circumstances from which a prudent, sensible commercial person can properly infer a danger of default?⁷ In cases where fraud or other dishonest activity has been committed, the threshold for establishing likely disposition of assets should not prove great. Conversely, the threshold will be more difficult to cross where the claim does not relate to such conduct but merely some lesser breach.⁸

[34] There has been no proven fraud or dishonest activity in this case. However, and as I have said, the evidence (which is untested at this stage) supports the applicant's concerns as to the first respondent's misuse of company funds for their own personal advantage. Further, there is evidence before the Court that suggests that

⁵ *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [97].

⁶ *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, (2014) 22 PRNZ 479 at [18].

⁷ *Wellington Tenth Trust v Skiffington* [2017] NZHC 1646, (2017) 24 PRNZ 244 at [48].

⁸ *Covington Group Holdings Ltd v Zhong (No 3)* (2004) 17 PRNZ 819 at [58(e)].

the first respondent has been taking active steps to sell off vehicles and other company property.

[35] Reference is also made to the fact that the first respondent is a citizen of the Philippines, which lends some weight to the potential risk of dissipation of assets overseas.

[36] Based on the affidavit evidence before the Court I am satisfied that there is a real risk that, if the orders sought are not made, the assets will be dissipated.

Assets to which an order can attach?

[37] I am also satisfied that there are assets to which an order can attach to, including bank balances and vehicles, held in New Zealand.

Possible defences

[38] Counsel has identified a number of possible defences, as required by r 32.3(a). There is evidence that the first respondent has previously said, when issues relating to record keeping and the like were raised with them, that they had received insufficient training and instruction in respect of such matters, and it is possible that they may deny any dishonest practices. Any such defence appears, on the evidence currently before the Court, to be weak. And while the applicant responsibly accepts that the first respondent may have adequate explanations in respect of some of the payments thrown up by the investigation, the number and nature of what appear to be irregular payments and transactions is strongly suggestive of deliberate misuse of company property over time.

[39] I have already referred to the potential jurisdictional issue. I agree with counsel that while there may be an issue

relating to jurisdiction that would not affect the Court's ability to grant interim relief. 9 I have also referred to the potential issues that may arise in respect of the duties owed as a Head Mechanic versus the first

9 *Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559 at [77]- [94].

respondent's duties as a director and concluded that the Supreme Court's judgment weighs in favour of jurisdiction lying in this Court. Accordingly, while I accept that jurisdictional issues may arise, I do not regard them as raising anything significant in terms of possible defences.

Balance of convenience and overall interests of justice

[40] The applicant estimates that approximately \$106,263.80 has been dishonestly appropriated by the first respondent, and that the figure may well rise. The applicant understandably wishes to avoid further losses while a full investigation is completed. I accept that if no order is made, and the assets are sold and the proceeds dissipated, the proposed claims could be rendered nugatory.

[41] The imposition of orders of the nature sought is draconian and significantly impacts a respondent. That impact can be lessened, at least to some extent, by providing for ordinary living, legal and business expenses (as set out in the draft order filed with the application).

[42] Standing back, I am satisfied that the balance of convenience and overall interests of justice support the making of the freezing orders sought.

Ancillary orders

[43] The applicant has also sought ancillary orders. The first is directed at requiring the first respondent to facilitate access to the vehicles named in the orders by an independent person to undertake a visual assessment, and to photograph, them. This is to enable the independent person to prepare a written report on the condition of the vehicles which will, in turn, enable the Court to monitor compliance with the terms of the freezing order.

[44] The second ancillary order sought is directed at requiring the first respondent to provide an affidavit particularising information detailing all of their bank accounts; shareholdings and investments; property interest; trusts of which they are a trustee or

beneficiary; bank accounts in the second respondent's name to which the first respondent contributes, has access to or controls; and any tangible assets owned by them with a market value over \$5,000. Further, requiring the first respondent to preserve all relevant financial information and to nominate a bank account for the purposes of meeting reasonable living, legal and business expenses.

[45] I accept that the ancillary orders sought are appropriate in the interests of justice and will ensure that the Court (and the parties) has a full picture before it when the application is heard on notice.

Conclusion

[46] Freezing and ancillary orders are to be issued by the Registrar, on condition that a statement of problem is to be filed promptly in the Employment Relations Authority.

[47] The orders are to be made in the form submitted with the application with minor amendments (to refer to both respondents and shortening the timeframe for an application to be brought before the Court to discharge or vary the orders).

[48] As the orders will be made without notice, they have limited effect so they expire at 10 am on Thursday 3 April 2025. At 10 am on Wednesday 2 April 2025 the matter will be called in the Employment Court at Auckland (or by AVL) for review as to whether to continue or renew the orders. The respondents or their representatives will be entitled to be heard by the Court on that date. Any party may apply in the meantime to vary or discharge the terms of the order on two business days' notice.

[49] I also direct that:

- (a) A copy of the order, this judgment, hearing notice and all supporting documents filed by the applicant are to be served on the respondents as soon as possible.
- (b) The Court is to be notified as soon as the documents referred to in 48(a) have been served. An affidavit of service must also be filed.

(c) This judgment is to be published 24 hours after that notification has been received.

[50] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 1.45 pm on 14 March 2025

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