Employment Court of New Zealand

LAF v MEC [2025] NZEmpC 23 (20 February 2025)

Last Updated: 15 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 MAKAURAU

[2025] NZEmpC 23
EMPC 67/2025

IN THE MATTER OF	a without notice application for freezing and ancillary orders
AND IN THE MATTER OF	an application for interim non-publication orders
BETWEEN	LAF Applicant
AND	MEC First Respondent
AND	NIR Second Respondent

Hearing:	19 February 2025 (Heard at Wellington by telephone)
Appearances:	PJ Anderson, counsel for applicant
Judgment:	20 February 2025

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application for freezing and ancillary orders) (Application for interim non-publication orders)

Introduction

[1] The applicant has filed a without notice application for a freezing and ancillary order against the first respondent, a former employee, and the first respondent's family trust.

[2] As the application has been made without notice, the first respondent has not had the opportunity to address the allegations.

Non-publication orders

[3] The applicant has sought an interim order of non-publication over the names and identifying details of the parties, recognising the damage that would likely be caused to the first respondent (and, it says, itself) if publication occurs.

[4] I accept that it is appropriate in the circumstances to make an interim order of non-publication. The allegations against the first respondent are serious, untested and likely to be highly damaging; and they have not had the opportunity to seek

non- publication orders themselves, given the application arises in the context of without notice proceedings. The second respondent is in the same position. I consider it appropriate to extend the order to the applicant, primarily on the basis that there is a risk that identifying the applicant company will lead to the identification of the first and second respondents.

[5] There will accordingly be an interim order over the identity of the respondents, including their name and any details that would tend to identify them, and over the evidence filed, except as referred to in this judgment. There will be a parallel order in respect of the name and identifying details of the applicant. There is an associated order that the Court file not be inspected by a non-party without the leave of a Judge.

[6] The orders of non-publication are interim and will need to be revisited in due course.

Freezing 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.1 An application

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

must be advanced in the Employment Court because the Employment Relations Authority has no power to make such orders.2

[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.

[10] Second, a written and signed undertaking as to damages must be filed with the application, and evidence provided (via affidavits) of the applicant's financial ability to meet an order for damages pursuant to the undertaking.

[11] Third, a draft order must be filed which refers to the undertaking as to damages.

[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 judgment 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.

Analysis

[15] The applicant has filed with the Court a draft statement of problem. While the respondent is no longer employed by the applicant, the alleged breaches occurred

2 Employment Relations Act 2000, s 160(4).

whilst in an employment relationship. I am satisfied that the causes of action are within the jurisdiction of the employment institutions.

[16] An undertaking has been filed in the appropriate form together with a supporting affidavit setting out the applicant's financial ability to meet an order for damages pursuant to the undertaking. A draft order has also been filed.

[17] I am satisfied, based on the material before the Court, that the applicant has a good arguable case. That material includes an investigative report into various bank transfers over time, and annexing the relevant documentary records. Those records lend weight to the allegations of misappropriation and fraud being advanced against the first respondent. The affidavit evidence also includes what are said to be contemporaneous notes of a meeting with the first respondent during which they accepted that they had transferred the company's money without authority into their personal and trust accounts.

[18] The applicant has identified assets of the first respondent to which the order can apply. The concern I have is in respect of whether the applicant has sufficiently identified, by way of evidential foundation rather than speculation, that there is a real risk of dissipation. This issue was the focus of oral submissions at a hearing convened on an urgent basis yesterday afternoon.

[19] There are three primary points that are referred to in support of the company's concern that the first respondent may dissipate assets. First, that fraud was committed and that the first respondent made admissions to that effect when presented with a draft investigation report. Mr Anderson, counsel for the company, submits that this goes "a considerable way" to establishing a risk of dissipation, relying on the observation made in *MNO v PQR*.3

3. *MNO v PQR* [2023] NZEmpC 109 at [25], citing *Covington Group Holdings Ltd v Zhong* (2004) 17 PRNZ 819 (HC) at [58(e)]; *Murren v Schaeffer* [2018] NZCA 318, (2018) 24 PRNZ 285 at [16]; and *BD v FG* [2022] NZEmpC 94 at [11].

[20] While I accept that an arguable case that fraudulent conduct has occurred will be relevant to an assessment as to whether there is a real risk of dissipation, that is not the end point. Judge Smith summarised the position in *Kang v Saena Co Ltd*:4

> [41] The burden is on the plaintiff to satisfy the Court that there is a prospect that the assets will be removed, dissipated or diminished in value. The test is not unduly exacting. In *Murren v Schaeffer* the Court of Appeal considered this aspect of the test and commented:

"The second stage requires the Court to be satisfied there is a danger that judgment will not be satisfied because assets may be removed or dealt with in a way that frustrates the judgment. ..."

> [42] The Court went on to observe that the test could be put in the following way:

"... The plaintiff must point to circumstances from which a "prudent, sensible commercial man, can properly infer a danger of default". ..."

> [43] It is not enough, however, to infer a risk of dissipation merely because the defendant "plays its financial cards close to its chest". *Mere suspicion is not enough. An assertion of a belief that a respondent will dissipate its assets unsupported by solid grounds justifying that belief is insufficient*.
>
> *[44] The application for freezing and ancillary orders relies on drawing inferences that involves assumptions without adequate support.*

[21] The circumstances of this case, as disclosed at this (untested) stage, can be contrasted to other cases where the Court has found a real risk of dissipation, including (for example) where the respondent has already begun disposing of assets.5 In *MNO*, which the plaintiff sought to rely on, there appears to have been evidence before the Court that the respondent was planning to move to another jurisdiction.6

[22] Further, it is apparent that the first respondent has known for some time that the company is aware that misappropriation has occurred, and has admitted to it. There is no evidence that the first respondent has taken steps to dissipate assets in the intervening period, in contradistinction to the position in, for example, *A Labour Inspector of the Ministry of Business, Innovation and Employment v Samra Holdings Ltd T/A Te Puna Liquor Centre*.7

4 *Kang v Saena Co Ltd* [2022] NZEmpC 36 (footnotes omitted; emphasis added).

5 *Potgieter v Bliss Beauty NZ Ltd* [2022] NZEmpC 203.

6 *MNO*, above n 3, at [26].

7. *A Labour Inspector of the Ministry of Business, Innovation and Employment v Samra Holdings Ltd T/A Te Puna Liquor Centre* [2020] NZEmpC 184 at [26]- [30].

[23] The second point made in support of the concern about dissipation relates to the first respondent's connection with Germany, and a fear that they may re-locate there. The concern is said to be based on the fact that their mother, whom they are in close telephone contact with and is experiencing some health issues, currently resides there. That needs to be weighed against the fact that the first respondent has a spouse in New Zealand, has lived here a long time, and the family home is here. If the first respondent was a flight risk it is, I infer, likely they would have left this jurisdiction by now. The more fundamental point is that something more than a connection to another country is required to support a concern about dissipation out of jurisdiction.

[24] Third, a concern was raised about what might be triggered by the first respondent becoming aware of the Police investigation which is currently on foot (it appears that the Police anticipate interviewing the first respondent this week).

> Reference was made to the fact that the first respondent, while admitting the conduct complained of, then proceeded to file a statement of problem in the Authority. This was pointed to, amongst other things, as reflective of a flighty or unpredictable disposition, which supported the company's concerns about the risk of dissipation. The point seems to me to be speculative. It is unlikely that it will come as any real surprise to the first respondent that the company has laid a complaint to the Police, or that it is being investigated, given the background and their admissions.
>
> [25] Finally, I appreciate the company's concern that the first respondent may not be in a position to fund any determination ultimately made against the first respondent in the Authority. However, and as Judge Holden recently observed:8

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

> [26] The High Court has also previously made the point that the risk that there would be no fund to satisfy a judgment is a position that a number of plaintiffs potentially face, but it is not a basis for the grant of a freezing order.9 And in *Washbourn v City Apartments Ltd*, the Court observed that, without proper evidence

8 *Whare Manaaki Inc v Anderson* [2024] NZEmpC 209 (footnotes omitted).

9 *Ilion Technology Corp v Johannink* HC Auckland CIV 2004-404-003358, 17 August 2004 at [39].

of propensity on the defendant's part to dissipate money or arrange her affairs so as to defeat any judgment, it would be wrong to grant an injunction to restrain persons from going about their ordinary affairs and business in an ordinary way.10 The observation underscores the serious (draconian) impact of freezing orders, which the Court is alive to when assessing whether such an order ought to be made.11

> [27] I am not satisfied that the applicant has established that a freezing order is necessary to protect them from a barren judgment, and nor am I satisfied (having regard to the balance of convenience or the overall interests of justice) that an order ought to be made in the applicant's favour.
>
> [28] The application was made without notice to the respondents. Counsel for the applicant 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.

Conclusion

> [29] I do not consider it appropriate to make the orders sought and decline to do so.
>
> [30] There is no order as to costs.

Christina Inglis Chief Judge

Judgment signed at 1.30 pm on 20 February 2025

10 *Washbourn v City Apartments Ltd* HC Wellington CP 46/00, 28 November 2001 at [40].

11. *Anderson*, above n 8, at [16], citing *Saomai v Prestige Demolition Services Ltd* [2016] NZEmpC 18 at [33]; and *Kang v Saena Co Ltd*, above n 4, at [48].
