



Employment Court of New Zealand

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MNO v PQR [2023] NZEmpC 109 (19 July 2023)

Last Updated: 27 July 2023

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2023\] NZEmpC 109](#)

EMPC 240/2023

IN THE MATTER OF an application for a freezing and
 ancillary orders
BETWEEN MNO
 Applicant
AND PQR
 Respondent

Hearing: On the papers
Appearances: M Wisker, LL Fraser and L Bercovitch, counsel for
 applicant
Judgment: 19 July 2023

JUDGMENT OF JUDGE KATHRYN BECK

[1] The applicant in these proceedings, MNO, has applied without notice for a freezing order and ancillary orders under [s 190](#) of the [Employment Relations Act 2000](#) (the Act) and [pt 32](#) of the [High Court Rules 2016](#) (the Rules) in respect of a bank account and any other assets held by the respondent to prevent them from disposing or otherwise dissipating that property pending the determination of the applicant's substantive claims. This judgment resolves that application.

Interim non-publication

[2] As this application is made without notice, the respondent has not had the opportunity to address the allegations or to try and preserve their identity. The allegations currently made are such that they may cause reputational damage.

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Therefore, it is necessary to consider whether to make an interim non-publication order.

[3] While there is no application before me in relation to interim non-publication, counsel for the applicant have advised that they agree to the interim non-publication order on the assumption that it will be made subject to further order of the Court.

[4] Accordingly, there is an interim non-publication order over the identity of the parties, including their names and any details that would tend to identify them, and over the evidence filed, except as referred to in this judgment. Further, I make an order that the Court file may not be inspected by a non-party without leave of the Court.

[5] This issue will be considered again when the application is heard on notice.

Background

[6] PQR was employed by the applicant as General Manager from 2 May 2022 until their dismissal on 6 June 2023. Their role as General Manager gave them significant authority and responsibility within the organisation including access to its payroll and accounting systems. PQR was the most senior employee within the business and reported to the Chair and Board of Directors.

[7] At some point, MNO became concerned about PQR's conduct and initiated a disciplinary process in relation to various allegations. For the purposes of these proceedings, the relevant allegations were that PQR approved their own payroll (which should have been approved by the Board Chair), authorised overtime and time in lieu payments to themselves for which they were not eligible, and made a manual payment for sick leave and other hours to themselves to which they were not entitled. After investigation, it was determined that PQR had authorised overtime and additional hours for themselves for which they were not eligible, in the sum of

\$41,936.90, and paid themselves time in lieu leave of 80 hours to which they were not entitled, to the value of \$6,923.20. In total, it was alleged that they had misappropriated funds in the sum of \$48,860.10 among other things. These findings were set out in a letter dated 6 June 2023 to PQR where they were summarily

dismissed as a result of their serious misconduct. Repayment of the sum was sought but has not been forthcoming.

[8] Following the respondent's dismissal, the applicant engaged BDO Chartered Accountants (BDO) to assist with a review of its internal controls and fraud risk. BDO identified that there were a number of irregular transactions during the respondent's tenure as General Manager.

[9] It identified that a number of suppliers registered in the company's Xero accounting system had the same bank account. This was confirmed by ANZ, the applicant's bank. The total amount the applicant paid into that bank account was

\$299,021.62. On reviewing a significant sample of payments into that bank account, it was discovered that PQR had created the relevant bill in Xero, approved the bill and paid it – usually within minutes of creating the original bill.

[10] The bank account was a Westpac bank account. ANZ asked Westpac to provide the identity of the account holder. In response to that request, ANZ was advised that the owner of the account was the respondent.

[11] In the course of the investigations undertaken by MNO's Acting General Manager, the company has not identified any commercial basis for MNO's payments into that bank account; nor is there any evidence that the four companies are entities or businesses which have ever supplied any services to MNO. Accordingly, it is of the view that PQR created false accounting records in its systems in order to channel payments to their own account.

[12] The applicant has estimated its total loss to be in the territory of \$350,000, being amounts that PQR has allegedly paid themselves to which they were not entitled, and a further \$104,000 in consequential tax losses arising from GST claimed and unpaid income tax.

[13] The applicant has provided a copy of the statement of problem it intends to file in the Employment Relations Authority. It has also laid complaints with the Police.

The law

[14] The Employment Court may make freezing orders. The purpose of a freezing order is to preserve property for enforcement purposes in circumstances where there is a risk of dissipation.

[15] Section 190(3) of the Act provides that the Court has the same powers as the High Court to make a freezing order, as provided in the Rules. It applies [pt 32](#) of the Rules, with appropriate modifications.

[16] This means that a freezing order may be made under r 32.2, which provides for 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.

[17] In order for the Court to grant a freezing order, the applicant must establish that:1

- (a) it has a good arguable case within the jurisdiction of the Court or the Authority;
- (b) the respondent has assets within the jurisdiction;
- (c) there is a real risk the assets will be dissipated or, if relevant, will be moved out of the jurisdiction; and
- (d) the balance of convenience and interests of justice require the grant of interim relief.

[18] Ancillary orders may be made if the Court considers it just to do so, including where necessary to elicit information relating to assets relevant to the freezing order.2

1 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 168 at [25]; see also *Potgieter v Bliss Beauty NZ Ltd*

[2022] NZEmpC 203 at [7]–[11].

2 *High Court Rules 2016*, r 32.3(2)(a).

[19] The Court is dealing with the matter at an early stage of the proceeding and takes that into account in considering the sufficiency of the evidence before it.³

[20] The applicant has provided the Court with an undertaking as to damages, which is required by r 32.2, as well as a draft statement of problem that they intend to file in the Authority, and draft orders. It has also filed an affidavit in support of the application, which annexes relevant documentation.

Arguable case within the jurisdiction

[21] On the face of it, the evidence from the applicant, including the documentary evidence attached to the affidavit, supports the allegations that PQR paid amounts to themselves to which they were not entitled, and that they created false accounting records in MNO's systems in order to channel payments of its funds into their own account.

[22] As submitted by the applicant, there is a good arguable case the actions alleged to have been taken by PQR constitute prima facie breaches of the express and implied terms of their employment agreement with MNO, their statutory duty of good faith, and their common law duty of fidelity to their employer.

[23] Those are all matters within the jurisdiction of the employment institutions

Assets within the jurisdiction

[24] The evidence provided demonstrates that the respondent has a bank account within the jurisdiction.

Real risk of dissipation

[25] There is prima facie evidence of fraud committed by the respondent which goes a considerable way to establishing that there is a risk of dissipation of their assets.⁴

3. *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, (2014) 22 PRNZ 479 at [18] and [31].

4 *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].

[26] The applicant also notes that PQR may be contemplating a move to Australia. Further, there is some immediacy to the risk of dissipation as they were dismissed by MNO on 6 June 2023.

[27] I am satisfied there is a risk the respondent's assets will be dissipated.

Possible defences

[28] Rule 32.2(3)(a) requires that the applicant identifies possible defences available to the respondent. The applicant has done so insofar as it can. While not aware of any credible defences, it anticipates that PQR will deny the allegations made against them.

Balance of convenience

[29] I am satisfied, on the balance of convenience and overall justice of the case as demonstrated by the evidence before the Court, that orders should be granted. As noted, the undertaking as to damages has been given by MNO which, on the evidence before me, it is in a position to meet.

[30] The orders expressly allow for either party to apply to vary the orders on short notice at any time and set out a process intended to ensure that they are reviewed as soon as reasonably possible after being granted.

[31] Making such orders will likely cause a degree of hardship and concern for PQR but, as required by r 32.6(3), the draft orders include that they are not prohibited from dealing with the assets covered by the order for the purposes of:

- (a) paying ordinary living expenses; or
- (b) paying legal expenses related to the freezing order; or
- (c) disposing of assets or making payments, in the ordinary course of business, including paying business expenses incurred in good faith.

[32] The ancillary orders sought by the applicant would require PQR to disclose by affidavit the nature, extent and value of their assets within or outside of New Zealand, confirm the nature of their interests in connection with the particular bank account in question, and exhibit the bank statements showing transactions from the bank account they control. Such orders will assist with the administration and enforcement of the asset freeze and will ensure the proportionality of the freezing order (in the event that PQR has assets which exceed the likely value of MNO's claim).

[33] Such orders are appropriate and for the benefit of all parties.

[34] Accordingly, I am satisfied that freezing and ancillary orders in the form submitted, with modifications as to the timing of the matter being brought back before the Court, should be made.

[35] The orders are to have effect until 5 pm on 7 August 2023 unless, prior to that time, they are continued or renewed. The case will be called again in court at 9.30 am on 7 August 2023. The purpose of the hearing will be to review the orders now made. The hearing will be by telephone. Any party may apply in the meantime to vary or discharge the terms of the orders on two working days' notice.

[36] A copy of the orders, this judgment and all documents filed by the applicant are to be served on the respondent as soon as possible. The Court is to be notified as soon as these documents have been served, and an affidavit of service must be filed.

[37] The Court may publish this judgment after the affidavit of service has been received.

[38] Costs are reserved.

Kathryn Beck Judge

Judgment signed at 5.15 pm on 19 July 2023