



# Employment Court of New Zealand

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## Saomai v Prestige Demolition Services Limited [2016] NZEmpC 18 (29 February 2016)

Last Updated: 17 March 2016

### IN THE EMPLOYMENT COURT WELLINGTON

#### [\[2016\] NZEmpC 18](#)

EMPC 52/2016

IN THE MATTER OF a without notice application for an injunction

BETWEEN ASOLELEI SAOMAI Applicant

AND PRESTIGE DEMOLITION SERVICES LIMITED Respondent

Hearing: 26 February 2016 (by telephone)  
(Heard at Auckland)

Appearances: G Ogilvie, advocate for applicant

Judgment: 26 February 2016

Reasons: 29 February 2016

### REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] These are the reasons for refusing the applicant a ‘without notice’ freezing order. I will describe, first, the process of the proceeding in this Court before summarising the applicant’s case on the facts. Finally, I will give my reasons for refusing relief.

[2] Late on the afternoon of 23 February 2016 the applicant, by his advocate, filed three documents. The first was a ‘without notice’ application for an injunction. The terms of an injunctive order were not specified and there was no draft order lodged. Next was a memorandum by the applicant’s advocate which was materially identical to the application for injunction. Third, there was an affidavit by the

applicant filed in support of the application for injunction.

ASOLELEI SAOMAI v PRESTIGE DEMOLITION SERVICES LIMITED NZEmpC WELLINGTON [\[2016\] NZEmpC 18](#) [26 February 2016]

[3] In his pre-filing discussion with the Registrar, Mr Ogilvie referred to applying for a ‘Mareva order’<sup>1</sup> which is the former name of what is now a freezing order contained specifically in the High Court Rules and referred to expressly in the Employment Relations Act (the Act). There is at least some uncertainty about any further jurisdiction resting in this Court, for example, to prevent, by injunction, the winding-up or otherwise ceasing to trade of a private limited company, which is why

I assumed that the relief sought by the applicant was a freezing order. Mr Ogilvie did not contradict this assumption when it was referred to him.

[4] After considering the papers, I issued a Minute on 23 February 2016 on that assumption that what was sought by the applicant was a freezing order pursuant to s 190(3) of the Act and Part 32 of the High Court Rules which apply in the absence of any specific applicable rules in this Court.<sup>2</sup> The Minute highlighted a number of deficiencies, including ones going to jurisdiction, in the papers filed but rather than refusing the application, I allowed Mr Ogilvie further time to substantiate and prove

his client's application.

[5] One of the directions sought by the applicant was for the Court to waive the requirement under the High Court Rules for a practising lawyer to certify the correctness of the papers filed.<sup>3</sup> I did not address that part of the application in my Minute because that impressed me as a consideration to be examined when the papers were otherwise in order and the statutory grounds for a freezing order made out. Further, because there had clearly been non-compliance with a number of

requirements at that point, I would not have been prepared to exempt the applicant from this requirement at that time.

[6] I subsequently convened a hearing with the applicant's advocate by telephone. At the conclusion of that hearing, I declined the application formally and said that I would deliver my reasons in writing which I now do.

[7] Now to the relevant factual background. As its name indicates, the respondent, Prestige Demolition Services Limited (Prestige Demolition), is a

<sup>1</sup> See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA).

<sup>2</sup> See [Employment Court Regulations 2000](#), reg 6.

<sup>3</sup> High Court Rules, r 7.23(5).

building/structure demolition company. Asolelei Saomai had been employed by the respondent for the past 10 years. Mr Saomai's first language is Samoan and, the respondent claims, his ability to understand and communicate in English is and remains limited. It appears that over the period of his employment Mr Saomai has worked as part of teams which include Samoan speakers who can understand instructions and otherwise communicate in English and who have interpreted for him. There is no suggestion on the papers filed that Mr Saomai has not worked satisfactorily during that period and there is no criticism by his employer of his standard of work. The respondent claims to have apparently encouraged the applicant over that time to learn English but it says that he has failed to do so.

[8] On 12 January 2016 the sole director and owner of Prestige Demolition, Denise Blake, spoke to employees about health and safety issues and, I infer, in light of legislative changes shortly to be implemented in these. <sup>4</sup> Apparently Dr Blake considered that Mr Saomai's insufficient understanding of the English language would mean that he would be unable to meet the safety standards expected by the company of its workforce. Mr Saomai says that he was then peremptorily suspended from further employment. He says that he had no inkling or warning of the nature of the meeting or that this might be a consequence of it. Although it was not indicated

to him at the time, the applicant has subsequently discovered that his "suspension" was without pay.

[9] Mr Saomai received a letter from Prestige Demolition's lawyer dated 21

January 2016. That letter confirmed that Mr Saomai had been "stood down from working until this issue could be addressed". It is not entirely clear what was "this issue" and how it might be addressed although it may have related to the respondent's perception of Mr Saomai's ability to understand and communicate in English. Alternatively, it may have meant that it appeared that he was about to be assigned to a work gang in which no-one else spoke Samoan.

[10] The lawyer's letter referred to "the forthcoming advent of the new health and safety legislation and the greater attention to such matters ...". Prestige

Demolition's lawyer said that the company would not be able to provide Mr Saomai

<sup>4</sup> The Health and Safety at Work Act 2015 comes into force on 4 April 2016.

with a safe place of work in the absence of learning the English language or always having another worker present who spoke Samoan. Knowing that Mr Saomai had intimated that he would take legal advice, Prestige Demolition's lawyer asked him to arrange for the lawyers to discuss the issue. The employer's lawyer's letter continued:

There is no wish whatsoever on the part of Dr Blake or Prestige Demolition Services Limited to terminate your employment if you can continue to work for the Company in a safe manner.

[11] It appears that Mr Saomai went to a community law office which, in turn, referred him to his representative, Mr Ogilvie. Mr Ogilvie is not a practising lawyer; he is a lay employment advocate. On Thursday 28 January 2016 Mr Ogilvie emailed the company's lawyer, Michael Quigg, asserting that the applicant had long been able to work safely and been able to understand specific safety and other requirements of the job. Mr Ogilvie asserted that the position had not changed and was not about to change so that Mr Saomai's employment would not be jeopardised by forthcoming legislative changes. Mr Ogilvie expressed surprise and concern that Mr Saomai had been stood down without prior consultation or an opportunity to get advice on that issue, but agreed to meet with Mr Quigg.

[12] Mr Quigg replied to Mr Ogilvie by letter of 3 February 2016. Describing Mr Saomai's difficulties in communication in English, Mr Quigg asserted that Prestige Demolition:

... constantly throughout this 10 year period [of Mr Saomai's employment] has been encouraging your client to learn English. To date the hazard has been able to be addressed by virtue of the fact that there have always been workers on site who spoke the Samoan

language and who were able to communicate with your client as regards health and safety matters pertaining to each individual site upon which he worked.

[13] Mr Quigg's letter to Mr Saomai's advocate continued:

... on 12 January when Dr Blake was conducting a site safe meeting, it became evident to her that for the balance of that week there would be no other workers working on site with your client who spoke the Samoan language. As a result, Dr Blake determined it was not possible to communicate with your client on health and safety matters and he was accordingly stood down from working due to the health and safety works

(sic) that this posed to both himself and those who were working around him. ...

As you will be aware, with the forthcoming advent of the Health and Safety at Work Act and the attendant publicity that has surrounded it, all employers are now more vigilant than ever to ensure that they are operating in a manner that ensures the safety of their workforce. Our client would welcome the return of your client to work provided his safety and the safety of others working around him can be assured. With his lack of ability to communicate in English and in any other language other than the Samoan language there is a significant risk posed when your client works on a job where there are no other workers present who are able to communicate in the Samoan language. That is the issues that our client wishes to address with your client through you on an urgent basis. We would be prepared to meet as soon as possible next week at a mutually suitable time. At that meeting, our client would welcome any constructive suggestions as to how to overcome the current situation.

[14] Next, by letter dated 5 February 2016, Dr Blake, as director of Prestige Demolition, wrote to Mr Saomai personally, then for the first time advising of her proposal to "merge" the company with another one wholly owned and directed by her, Prestige Cleaning Services Limited (Prestige Cleaning). The letter indicated a proposal that the business of Prestige Demolition be 'folded' into the business of Prestige Cleaning with the possibility that the new business would be renamed Prestige Cleaning and Demolition Services Limited. Doctor Blake's advice to Mr Saomai was:

If the proposed new structure is implemented, all roles within Prestige Cleaning would be disestablished and become redundant. Prestige Demolition will negotiate with Prestige Cleaning whether you can be offered new employment with Prestige Cleaning on the same or similar terms to those you currently enjoy with Prestige Demolition.

[15] It is now common ground that there was a fundamental error contained in this advice that, although perpetuated for some time, was subsequently rectified by Prestige Demolition when it was pointed out by Mr Ogilvie. The error was that positions at the demolition company would be redundant rather than at the cleaning company as Dr Blake had advised Mr Saomai. The applicant may have relied upon his employer's erroneous advice, at least initially.

[16] Doctor Blake's letter of 5 February 2016 continued:

In the event that you were not successful in securing another role within Prestige Cleaning, you would be given notice of a period that is not less than the three weeks set out in your employment agreement. Your employment agreement makes no provision for the payment of redundancy compensation however if the proposal proceeds, upon termination you will be entitled to be paid any outstanding salary and accrued annual leave owing to you.

[17] The letter invited Mr Saomai's "feedback on the above proposal" by Friday 12 February 2016, that is within seven days after the letter was written to him.

[18] Mr Ogilvie responded to Dr Blake, on behalf of the applicant, by email dated 9 February 2016. He expressed the applicant's wish to have an opportunity to be involved in the consultation about the future of his employment but said, not without justification in my view, that Dr Blake's letter did not provide sufficient relevant information. Specifically, Mr Ogilvie wrote:

Advising that your two companies are merging does not explain any reason why Aso's job could be affected. We presume your demolition business will continue so therefore there is no reason why you should consult with yourself over Aso's continuing employment. Any change you make to the cleaning jobs should not affect the role of the demolition staff.

Before we can participate in any consultation we need to have full details of your ongoing business plans and the reasons you have for any changes.

[19] Doctor Blake responded to Mr Ogilvie by email on the following day, 10

February 2016. She asserted that her letter had provided the relevant information and reiterated the relevant paragraph of her original letter. She said that the rationale for the proposed redundancy was "[t]o save administration costs and achieve other economies of scale ..." as being the rationale for the proposed merger of the two companies. Doctor Blake denied that there were any "ongoing business plans prepared" and said that this was inappropriate for a small business.

[20] Mr Ogilvie replied, on behalf of Mr Saomai, on Friday 12 February 2016 at

4.26 pm advising Dr Blake that her responses had not provided sufficient information about the reasons for the proposed employment changes, and asserted that “[w]ithout any business plans there can be no justification for any redundancy.” Mr Ogilvie reiterated his request for advice of ongoing business plans and the reasons for any changes to Mr Saomai’s job.

[21] There was a meeting between Mr Saomai, his wife and his representative with Dr Blake and Prestige’s lawyer on 17 February 2016 at which the solicitor advised that Mr Saomai’s suspension from 12 January 2016 had been without pay although Mr Saomai says that this advice had not been given to him previously and he was unsure about the basis of his suspension. Mr Saomai says that at the 17

February meeting he was also told that he was dismissed without notice. He subsequently raised a personal grievance by a letter from his advocate to Prestige Demolition dated 22 February 2016.

[22] The foregoing summary of facts is by Mr Saomai’s account alone, although I have relied significantly on written correspondence that is indisputable. Mr Saomai appears to have a strong arguable case of unjustified dismissal pursuant to the tests propounded in s 103A of the Act and, thereby, in reliance also on the good faith obligations under s 4 of the Act on employers in circumstances such as those of Prestige Demolition. It may be open to Mr Saomai to seek, as part of his claim to unjustified dismissal in the Employment Relations Authority, an order for interim reinstatement either with the respondent or with Dr Blake’s successor company on the assumption that demolition work is still being performed by either or both of those entities and that another entity may have taken on the rights and obligations of the demolition-alone company. As Prestige’s lawyer’s correspondence confirmed, it did not want to lose Mr Saomai’s services and wished to address the language communication issue with him

[23] I now address my reasons for refusing injunctive relief without notice.

[24] As the applicant’s advocate was advised in the Court’s Minute of 23 February

2016 allowing a further opportunity to rectify these deficiencies, there was no reference to the applicant’s obligation to fully and frankly disclose to the Court all material facts including any possible defences known to the applicant and information casting doubt on the applicant’s ability to discharge the obligations

created by an undertaking as to damages.<sup>5</sup> Indeed, no undertaking as to damages

was ever given by the applicant although the Court had pointed out that this itself would not necessarily be fatal to the application if there were cogent reasons why

<sup>5</sup> High Court rules, r 32.2(3).

such an undertaking could not be given and these reasons were provided to the

Court.

[25] Next, there was no indication of proceedings having been filed or to be filed in the Authority following the requirement for this pursuant to the Court’s Practice Direction on search and freezing orders.<sup>6</sup> There was no property to which a freezing order may have attached, at least referred to in the papers filed.

[26] There was no draft order for consideration of the Court. That was particularly significant in view of the fact that the application had not specified any, even general, information about the sort of injunctive relief sought. There was no proposed duration of the order or other arrangements whereby the matter could be back before the Court after service on the respondent. There was no information about possible defences to the applicant’s proceeding as is required.

[27] There were other informalities and deficiencies in the ‘without notice’ application for a freezing order including, as already noted, it was not possible to discern the terms of the order sought. Unrectified, these deficiencies were together fatal to the application.

[28] I deal now with the application for waiver of compliance with the lawyer- certification requirement in a freezing order application.

### **High Court r 7.23**

[29] Rule 32.2(4) of the High Court Rules provides: “An application for a freezing order must be made by interlocutory application under Part 7 or originating application under Part 19, which Parts apply subject to this Part.”

[30] A freezing order is an injunctive order so that, in this case, Part 7 of the High

Court Rules applies to an application for a freezing order. Rule 7.23 (“Application without notice”) of the High Court rules is as follows:

<sup>6</sup> Ministry of Justice, “Employment Court consolidated practice directions” (July 2015)

[www.justice.govt.nz/courts/employment-court/legislation-rules](http://www.justice.govt.nz/courts/employment-court/legislation-rules) at 9.

### **7.23 Application without notice**

(1) If the applicant wishes the application to be determined without any

other party being served (in these rules referred to as an application without notice), the applicant must use form G 32.

(2) An application without notice must contain a certificate that—

(a) uses the words “I certify that this application complies with the rules”; and

(b) is personally signed by the applicant’s lawyer.

(3) The lawyer who signs the certificate must, before signing it, be personally satisfied that—

(a) the application and every affidavit filed in support of it complies with these rules:

(b) the order sought is one that ought to be made:

(c) there is a proper basis for seeking the order in an application without notice.

(4) The lawyer is responsible to the court for those matters.

(5) Despite subclause (2), a Judge may dispense with the certificate if the applicant is unrepresented and justice so requires, and if dispensation is sought, the applicant must state the reasons for the absence of a lawyer’s certificate.

[31] Mr Ogilvie’s application relies on r 7.23(5) and seeks a dispensation from the requirement for certification under sub-rr (2) and (3). He submits that because Mr Saomai is not represented by a solicitor (but, rather, by a lay advocate) and because the applicant does not have the financial resources or other ability to engage a lawyer, an exemption should be granted. Legal aid (and particularly an emergency grant) may be available to an applicant, but I will not speculate on that as it has not been referred to on the papers filed.

[32] It is correct that a litigant in proceedings before the Employment Court may be represented by a range of persons including an officer or member of a union and an agent in addition to appearing personally or being represented by a barrister or solicitor.<sup>7</sup> But that empowering provision alone does not extend to requiring the Court to allow a lay advocate to do everything in litigation that may be required of a practicing lawyer.

[33] A freezing order is draconian in the sense that it interferes judicially, albeit temporarily, with a person’s property or assets prohibiting their usual freedom to deal in these. Although necessarily in a practical sense, doing so without notice to the affected party increases the invasiveness of such an order and the need for the Court

<sup>7</sup> [Employment Relations Act 2000](#), sch 3, cl 2.

to be satisfied that the law’s strict requirements and, so far as they can be, the property owner’s rights, are complied with and respected. Hence the requirement under r 7.23 of the High Court Rules on a ‘without notice’ application for an injunction for an officer of the High Court (a practising lawyer) to certify that every aspect of the application complies with the Rules; the order sought is one that ought to be made; and that there is a proper basis for seeking the order in an application without notice. So, for example, in the case of freezing orders, there are further requirements imposed by r 32 of the High Court Rules. In r 32.2(3) an applicant for a freezing order without notice must fully and frankly disclose to the Court all material facts including any possible defences known and any information casting doubt on an applicant’s ability to discharge the obligation created by the undertaking as to damages. That is an onerous duty on an applicant’s counsel that may appear to a client to be antithetical to the lawyer’s obligations to his or her client. It is an

example of a lawyer’s over-riding duty to the Court,<sup>8</sup> a duty that a lay advocate does not have in law.

[34] As the commentary to r 7.23 in *McGechan on Procedure* notes:<sup>9</sup>

Certification is more than a mere technicality, it is a clearly stated mandatory precondition. The certificate emphasises the importance of accuracy and propriety in an application without notice because, by definition, an application without notice is a denial of the natural justice upon which all litigation is fundamentally intended to rest.

[35] So, penultimately and upon reflection, I would not have been prepared to waive the requirement for a lawyer’s certification of the correctness of the application under r 7.23(5) of the High Court Rules. Whilst such a waiver may be given where an applicant is unrepresented (as long as the Court is satisfied that it is proper in all the circumstances to do so), Mr Saomai is represented by a lay advocate in this proceeding. The inadequacies of the application are such that the Court could not have been confident that there had been compliance with the applicable rules. In saying this I appreciate that it may be seen as unfairly counting against a litigant who is unable to deal with such matters without professional assistance but who,

nevertheless, is unable to afford a lawyer.

<sup>8</sup> See *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, r 13.

<sup>9</sup> Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at

[36] An application without notice for a freezing (or a search) order is legally technical, complex, and far removed from the run-of-the-mill grievances and disputes with which lay advocates usually deal. If any particular case requires such an interlocutory remedy, it will probably also warrant the advice of and representation by an experienced lawyer. As I have already noted, there are alternative remedies which may prove as or more effective in this case and which are brought to the Authority by lay advocates. This also counted against the granting of the discretionary remedy of a freezing order in this Court.

[37] Because no costs have been incurred by the respondent in this matter, there will be no order relating to costs.

GL Colgan  
Chief Judge

Judgment signed at 4.20 pm on Monday 29 February 2016

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