

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 144B/08
5121645

BETWEEN TEMPERZONE LIMITED
Applicant

AND OWEN RAYMOND JOY
Respondent

Member of Authority: Alastair Dumbleton

Representatives: David Neutze and Mark Frogley, counsel for Applicant
Paul Wicks, counsel for Respondent

Investigation Meeting: 20 June 2008

Memoranda received 23, 24 & 31 July 2008

Determination: 6 August 2008

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY MATTER (No 2)**

Application to vary Authority orders

[1] Following the granting of a *Mareva* injunction against him on 16 April 2008 (under AA144/08), the respondent Mr Joy applied for a variation of the Authority's orders.

[2] He sought rescission of the particular orders freezing his ASB Bank account and preventing him from having any beneficial dealing or involvement with two residential properties owned by the ORJ Trust which he administers.

[3] According to counsel's advice in early May 2008, the ASB account then had in it \$283,273. The ORJ Trust owed Mr Joy \$487,000 in respect of the acquisition of its houses, one of which he lives in. This debt is repayable on demand to him.

[4] Rescission of the orders would leave frozen only Mr Joy's superannuation fund which, in early May 2008, had a current account balance of \$451,707.

[5] In the alternative Mr Joy sought a variation that would allow \$150,000 to be released to him from the ASB account.

[6] He sought relief from the 16 April orders to enable him to meet his living expenses and to pay legal expenses pending the investigation of the substantive claim brought against him, which is to commence on 8 September 2008 and may take up to 10 days to complete. There is no dispute that as a matter of well established legal principle a party restrained by a Mareva injunction should nevertheless be entitled to access sufficient funds to meet legal expenses and living costs.

[7] Since being summarily dismissed by Temperzone on 11 April 2008, Mr Joy has not had the income from the substantial salary of \$350,000 paid to him while employed.

[8] His age and the fact that for 34 years prior to dismissal Temperzone had been his only employer, will make it hard for him to find paid work and earn an income to meet his expenses.

[9] Mr Joy's estimate of living expenses is about \$3,500 per month, and in legal expenses he had already incurred over \$10,000 by early May. Over the three months since then there has been considerable activity required of his counsel Mr Wicks, with a substantial affidavit required to be sworn on 13 June and presented to the Authority, investigation meetings with regard to this preliminary matter held on 23 May and 23 June, and a number of memoranda filed on the same issue.

[10] Legal expenses are likely to have increased considerably since early May and will keep climbing during the extended investigation meeting that is anticipated.

[11] The allegations of Temperzone that Mr Joy stipulated for and received secret commissions in the course of his employment, relate to dealings by him with customers or suppliers based offshore in Asian countries, principally Thailand and China. Although the procedure in the Authority is investigatory rather than adversarial, the nature of the claims and access to evidence about them makes it vital in this case that participants in the investigation are not left unrepresented but have the objective advice of experienced counsel available to them.

[12] The Authority has limited ability to compel evidence from outside New Zealand, and it does not have unlimited resources to pay the travel costs and expenses

of any witnesses overseas it might want to question. If the Authority wishes to obtain such evidence it will need to rely on Mr Joy to make the witnesses available or least be able to bring them here if requested, by paying travel costs and expenses where necessary.

[13] In this regard the availability of legal representation will benefit not only Mr Joy but Temperzone and the Authority too. As observed in the judgment of the High Court in *Algert Co Inc. v. United States Imports Ltd and others* unreported, CP 350 – SW/99, 1 February 2001, at page 12, legal representation in a case such as this will enable the speedier and better resolution of the issues arising in the substantive proceedings.

Consent to variation

[14] While initially strongly opposed to any variation of the orders, Temperzone now consents to Mr Joy being able to draw up to \$100,000 from his ASB Account for legal expenses and living costs. Mr Joy has accepted that level of variation and withdraws his application on this preliminary issue.

Variation to order

[15] Accordingly, the sealed order of the Authority dated 16 April 2008 is amended to the following;

4. *Save for \$100,000 in total, the respondent or any other person shall not withdraw or be paid any moneys from the respondent's bank account held at ASB Bank relating to customer number 12 – 3089 – 00096638 while the balance in these accounts is less than the sum of \$2 million.*

[16] The variation to the order shall take effect from the time of service of this Authority determination (No 2) upon the ASB Bank.

Timetable for investigation meeting

[17] The timetable that has been agreed by the parties for the investigation meeting of the substantive claims is to be followed. Temperzone is to file and serve by 21 August 2008 its briefs of evidence of witnesses to be called. Mr Joy is to file any further briefs of evidence by 4 September 2008. The sworn affidavits already before

the Authority in evidence may be relied upon. The parties are to provide with their briefs of evidence a bundle of any additional exhibits intended to be produced.

Costs

[18] Costs remain reserved.

A Dumbleton
Member of the Employment Relations Authority