

**ORDER FOR INTERIM NON-PUBLICATION OF NAME AND  
IDENTIFYING DETAILS OF THE PARTIES**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 222  
EMPC 401/2023**

IN THE MATTER OF                    an application for without notice freezing  
and ancillary orders

AND IN THE MATTER OF           an application for interim non-publication  
orders

BETWEEN                            STU  
Applicant

AND                                    FRD  
Respondent

Hearing:                            4 December 2023  
(via telephone)

Appearances:                    S Langston and T Sung, counsel for applicant  
E Anderson, counsel for respondent

Judgment:                           5 December 2023

---

**JUDGMENT (NO 4) OF JUDGE M S KING  
(Further application to amend and extend orders and  
interim non-publication orders)**

---

[1]     On 6 November 2023, a judgment was issued by this Court making without notice freezing and ancillary orders under s 190(3) of the Employment Relations Act 2000 and Part 32 of the High Court Rules 2016 in respect of the property of the respondent, FRD, to prevent him from disposing or otherwise dissipating that property

pending the determination of STU's substantive claims.<sup>1</sup> The order has been extended twice.<sup>2</sup> In the Court's most recent judgment of 29 November 2023 extending the orders, the Court noted that FRD had filed an application for the variation of the freezing orders and an application for interim non-publication, and it timetabled the urgent hearing of the applications on 4 December 2023.

[2] Shortly before the hearing, a joint memorandum of counsel was filed informing the Court that the parties had conferred and reached agreement on the application for interim non-publication. In regard to the application for variation, the memorandum advised that the parties had agreed to a practical way forward which provided for the release of funds to FRD to allow him to pay his legal costs in respect of these proceedings, and the related proceedings in the High Court and the Employment Relations Authority. This left one remaining live issue to be determined by the Court being an application by FRD to vary clause 4.c of the freezing orders.

[3] The parties helpfully filed detailed submissions which were traversed at yesterday's hearing. At the hearing Ms Anderson advised the Court of FRD's intention to file an application for discharge of the freezing orders in the near future. After considering the submissions I make an interim non-publication order which will be reviewed at the next call of this matter. A further order is made to amend the freezing orders to allow FRD to open one bank account which is unrestrained by the freezing orders, for the primary purposes of receiving his wages from his new employment and paying his ordinary living expenses. The amended freezing orders are extended to 5 pm on 13 February 2024. The reasons for the orders are set out below.

### **Non-publication order**

[4] In the earlier judgments of the Court, directions were made that the judgments were not to be published other than to the parties, their representatives and to authorised persons and that the Court file may not be inspected by a non-party without leave of the Court until FRD has had an opportunity to address the allegations against him and decide whether to apply for a non-publication order to preserve his identity.

---

<sup>1</sup> *STU v FRD* [2023] NZEmpC 190.

<sup>2</sup> *STU v FRD* [2023] NZEmpC 213; *STU v FRD* [2023] NZEmpC 214.

[5] On 27 November 2023, FRD filed an application for interim non-publication orders over this matter. The application is made on the basis that FRD requires further time to be able to respond substantively to the serious allegations against him, that the allegations are likely to cause FRD to suffer significant reputational damage and that an interim non-publication order will preserve FRD's position until FRD is able to substantively respond to the allegations and be heard on notice. STU filed a notice of opposition to the application raising concerns over the impact such an order would have on the contemporaneous High Court proceeding involving FRD's wife and the related company.

[6] The joint memorandum of counsel filed shortly before the hearing provides that interim non-publication orders prohibiting the publication of the names of parties and any details that would tend to identify them could be made by consent of the parties, on the following conditions: the interim non-publication orders will not apply to experts that may need to be engaged for the purposes of both this proceeding and the High Court proceedings; the orders will not prevent the parties from informing entities that need to be informed to enforce the freezing orders; and the orders will not prevent the progression of the High Court proceedings, including communications with the High Court and the defendants in the High Court proceeding.

[7] After considering the application, the notice of opposition and the joint memorandum of counsel filed, I consider that it is appropriate for there to be interim non-publication orders made. The interim non-publication orders sought are consistent with the parties' desire to preserve their position. The allegations made against FRD are such that they may cause him reputational damage. Further FRD has not had an opportunity to substantively address the allegations against him due to the without notice nature of the freezing orders which were made.

[8] 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. The order will not apply to the following:

- (a) communications with experts that may need to be engaged for the purposes of this proceeding, the High Court proceeding or the Employment Relations Authority proceeding;
- (b) communication with entities that need to be informed to enforce the existing freezing orders; and
- (c) communications with entities, including any parties and relevant courts or tribunals, that need to be informed to facilitate the progression of this proceeding, the High Court proceeding, or the Employment Relations Authority proceeding.

[9] Further I make an order that the Court file may not be inspected by a non-party without leave of the Court. The interim non-publication order will be revisited when this application is called again. Lastly the interim non-publication order will also apply to the Court's earlier judgments in this proceeding.<sup>3</sup>

### **Application for variation of freezing orders**

[10] Ms Anderson, on behalf of FRD, seeks for clause 4.c of the freezing orders to be varied. Clause 4.c currently provides:

- 4. This freezing order is made in respect of the following assets:
  - ...
  - c Any other assets with a value over \$5,000 located in New Zealand either real or personal (including bank accounts), in which the defendant has a beneficial and legal interest, power o[f] disposition, whether solely or jointly with any other person/entity.

[11] Ms Anderson submits that clause 4.c is a catch-all provision which encompasses any assets of \$5,000 or more and that the clause lacks specificity and leaves considerable room for disagreement over which assets are encompassed by it. Ms Anderson wishes for the clause to be removed and replaced with a requirement that there be a comprehensive list of assets to which the freezing orders are to attach

---

<sup>3</sup> *STU v FRD*, above n 1 and 2.

to. She submits that varying the orders in this way would provide clarity to FRD on which assets are affected and the variation would be consistent with the form G 38 of the High Court Rules 2016 which instructs a party drafting a freezing order to:

Set out a comprehensive list, with description adequate to identify each asset.

[12] Ms Anderson accepts that in some cases, an applicant may have an incomplete picture of a respondent's assets, and in those circumstances a catch-all provision such as clause 4.c may be appropriate. However, she submits that this is no longer the case here.

[13] Ms Anderson submits that there is no evidence before the Court that FRD has not responsibly disclosed all assets, as required by the ancillary orders. She says that STU is now able to identify which of FRD's assets that it says are restrained by clause 4.c of the orders. Ms Anderson says the freezing orders should be varied to require STU to provide a comprehensive list of the relevant assets that are restrained by clause 4.c.

[14] Ms Anderson informed the Court that FRD was starting new employment on 4 December 2023. If the application for a variation was granted, it would allow him to create a new bank account, which he would use to receive his wages and pay his ordinary living expenses, and which would fall outside the scope of the freezing orders. Ms Anderson says that clause 4.c and in particular the inability for FRD to operate a bank account to pay his ordinary expenses and receive his income has inflicted hardship and unjustifiable controls on FRD and his family's life.

[15] STU filed a notice of opposition to FRD's application for variation. Ms Langston, counsel for STU, says her client opposes the removal or variation of clause 4.c of the freezing orders. She says that the clause is sufficiently clear to identify assets captured, namely any asset of FRD's that is over \$5,000, that the clause complies with form G 38 of the High Court Rules, and that the orders in clause 4.c are used in the High Court without any controversy.

[16] Ms Langston opposes any variation of the orders that would allow FRD's income from his new employment to be paid into a bank account over which STU has

no visibility or control. She says that the current freezing orders enable the capture of assets that are not known, have not been disclosed by FRD and/or are not in existence at the time the orders are made to ensure that the assets of FRD are not dissipated. Ms Langston says the orders capture FRD's income from his new employment and any money that may be transferred into this new bank account by a third party.<sup>4</sup> She also submits that this money should be captured by the orders and FRD only be permitted to be paid his ordinary living expenses from his income or from third party payments. Ms Langston raised a concern that if the Court allowed FRD to open an unrestrained bank account it would provide FRD with a method to dispose of his funds that he has not disclosed. Ms Langston submits that the freezing orders should remain unvaried so it can capture FRD's income from his new employment and any other payments made into the account.

[17] Ms Langston says there is no prejudice to FRD in the orders remaining as they are. There are other ways FRD can access funds to pay expenses allowed under the existing freezing orders, which ensure that the purpose of the orders are not defeated. She referred to the affidavit of Ms Dowd, which provided a copy of the communications between the parties in which they sought to negotiate the scope of the freezing orders with a view of settling FRD's application for variation. In the communications and at the review hearing STU proposed a variation which would allow FRD's income to be paid into the frozen joint account he had with his wife and from that account, that a payment would be made into a new unrestrained joint account for FRD and his wife. From that account, it was proposed they would pay their living expenses. However, FRD's lawyers would monitor the account and provide confirmation to STU of the amounts paid into the account and ensure that mortgage payments on residential properties affected by the freezing orders were being made from that account.

[18] Ms Anderson advised that STU's proposal was not acceptable to FRD and that the proposal overreached, was punitive, was overly intrusive from a privacy

---

<sup>4</sup> She relies on *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1986] 1 WLR 141 where in the obiter Skinner J observed that a freezing order would encompass assets acquired after the date it was granted.

perspective and created undue hardship on FRD and his family in trying to lead their ordinary lives and pay their ordinary living expenses while the orders were in place.

### **Legal framework**

[19] It is necessary to describe the legal principles which apply to an application for variation of the freezing orders.

[20] Section 190(3) of the Employment Relations Act provides that the Court has the same powers as the High Court to make freezing orders, as provided for in the High Court Rules 2016.

[21] Part 32 of those Rules is applied by the Court with appropriate modifications.

[22] Rule 32.8 provides that freezing orders must reserve leave to a respondent to apply for the Court to discharge or vary the freezing orders. There is accordingly jurisdiction to consider both the present application for variation and the intended application for discharge.

[23] The first legal point I should mention relates to the Court's ability to consider the merits on the present application for variation.

[24] Before the freezing orders could be made, the Court had to be satisfied that the applicant had a "good arguable case on an accrued or prospective cause of action" against the respondent.<sup>5</sup> The Court was satisfied to the necessary standard.

[25] The Court of Appeal confirmed in *Hannay v Mount* that a good arguable case is established if the allegations in the proposed claim are capable of tenable argument and are supported by sufficient evidence, bearing in mind the early stage at which the application is likely to be brought.<sup>6</sup>

---

<sup>5</sup> High Court Rules 2016, r 32.5(1)(b).

<sup>6</sup> *Hannay v Mount* [2011] NZCA 530 at [22].

[26] Thus, a freezing order once made continues on the basis that the proposed claim brought by the applicant is capable of tenable argument, as assessed on a provisional basis.

[27] Since that threshold has been cleared, and it is common ground that the freezing orders will continue, it is inappropriate for the Court to go any further in assessing the merits of the strongly contested claims and counterclaims which the parties either have raised or intend to raise.

[28] The second legal point which is relevant for present purposes is that, as again confirmed by the Court of Appeal in *Hannay*:<sup>7</sup>

The essential basis of a freezing order is to prevent the dissipation of assets by an actual or prospective judgment debtor, when such dissipation has the effect or object of denying the claimant or judgment creditor satisfaction of their debt.

[29] Freezing orders do not give an applicant priority over assets; nor is it intended to have a punitive effect on a respondent against whom nothing has yet been proven.<sup>8</sup>

[30] For these reasons, a respondent is permitted to draw on assets to make payments in good faith in the ordinary living expenses. That point is enshrined in r 32.6(3) which confirms that a freezing order does not prohibit a respondent from dealing with the assets covered by the orders for the purpose of:

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

---

<sup>7</sup> Above n 6, at [20].

<sup>8</sup> See, for example, *Twentieth Century Fox Film Corp v Dotcom* [2016] NZHC 1948 at [28].

[31] Any application for variation must, therefore, be considered in light of these principles. I have considered relevant authorities which have done so.<sup>9</sup>

## **Discussion**

[32] In summary, Ms Anderson has submitted that a variation is required on the basis that the orders in clause 4.c are a “catch-all” provision which are too broad, lack specificity and leave considerable room for disagreement over the interpretation of assets that are encompassed by it. She says the orders have caused FRD and his family hardship in paying their ordinary living expenses and are punitive in nature. She says the orders should be varied to remove clause 4.c and that it should be replaced with a requirement that there be a comprehensive list of assets to which the freezing order is to attach to.

[33] STU opposed any variation or removal of clause 4.c of the orders. Ms Langston submits the clause is sufficiently clear to identify assets captured, namely any asset of FRD’s that is worth over \$5,000. It is submitted that the orders in clause 4.c enable the capture of assets that are not known, not disclosed by FRD and/or not in existence at the time the orders were made to ensure that the assets of FRD are not dissipated.

[34] During the hearing it became apparent that FRD was primarily seeking to vary the orders, so as to allow him to open one new bank account that was not restrained by the freezing orders. The bank account was primarily to be used as a transactional account to allow FRD to pay his ordinary living expenses and allow his income from his new employment to be paid into that account. STU objected; it wanted to restrain FRD’s income from his employment and only release to him the amount the parties had agreed which constituted his ordinary living expenses and nothing more. STU was concerned that FRD may use the bank account to dispose of his funds that he has not disclosed. It sought to monitor the bank account and receive confirmation of the amounts paid into the account and ensure the relevant mortgage payments were being

---

<sup>9</sup> *A v C* (No 2) [1981] 1 QB 961 (QB); *TGB Holdings Ltd v BFP Trustees No 1 Ltd* HC Whangarei CIV 2009-488-566; and *Dotcom*, above n 8.

made from that account. However, Ms Langston accepts that there is no evidence before the Court that FRD has not fully disclosed his assets.

[35] First, as already explained, STU's claims have not been tested. All that has happened is that the Court has found it has a tenable claim. On an application for variation in these circumstances, it is not appropriate to make significant findings as to the merits.

[36] Second, it is clear from the High Court Rules and many authorities that a party is not prohibited from dealing with assets covered by the orders for the purposes of paying ordinary living expenses. Dealing with assets in that manner does not amount to an unjustified dissipation of assets. Further there is no evidential basis before the Court to suggest that FRD has not disclosed assets or would use a newly created bank account as a method for disposing of any funds that he has not disclosed. The mere assertion of belief that FRD might dissipate assets through the use of this bank account is insufficient.<sup>10</sup>

[37] While the Court accepts that the freezing orders could encompass assets acquired after the date the injunction was granted,<sup>11</sup> it does not consider that the balance of convenience and the interests of justice would in the circumstances favour the making of freezing orders that would restrain future income that FRD is to earn from his new employment. Based on FRD's previous earnings it is likely that the income FRD is to receive will be modest and be used towards paying his ordinary living expenses, which he could otherwise seek to claim from the assets frozen by the orders. In the circumstances I am satisfied it is in the interests of justice that the freezing orders be amended to allow FRD to open one new bank account. The name and account number is to be included in the amended orders and the orders will provide that the named bank account will not be restrained by the freezing orders (the bank account). The bank account will be used primarily for the purposes of receiving FRD's income from his new employment and for receiving and paying his ordinary living expenses as provided in clause 6.a of the orders. Clause 4.c of the orders is to

---

<sup>10</sup> *Mogilin v Jo HC Auckland CIV 2011-404-1584*, 26 August 2011 at [34].

<sup>11</sup> *TDK Tape Distributor (UK) Ltd v Videochoice Ltd*, above n 4.

otherwise remain unaltered, but for the avoidance of doubt, it will not apply to the bank account even if the balance from time-to-time will exceed \$5,000.

**Final matters**

[38] The freezing orders as amended above are extended to until 5 pm on 13 February 2024 unless, prior to that time they are again continued or renewed. The matter will be called in the Court at 9.30 am on 12 February 2024 via AVL. The parties are encouraged to communicate with each other and to file a joint memorandum in advance of the next Court date.

M S King  
Judge

Judgment signed at 6 pm on 5 December 2023