

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

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

**[2025] NZEmpC 73
EMPC 148/2025**

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

BETWEEN A LABOUR INSPECTOR OF THE
MINISTRY OF BUSINESS INNOVATION
AND EMPLOYMENT
Applicant

AND THOM DAO
First Respondent

AND VIET HUNG NGUYEN
Second Respondent

AND DUONG ALEX NGUYEN
Third Respondent

Hearing: On the papers

Appearances: M Denyer, counsel for applicant

Judgment: 9 April 2025

JUDGMENT OF JUDGE KATHRYN BECK

Introduction

[1] This judgment resolves a without notice application for a freezing order and ancillary orders.

[2] The application is supported by affidavit evidence from the Labour Inspector, a memorandum of counsel and draft orders.

[3] After reviewing the documentation, I was satisfied that the circumstances justified the application being dealt with promptly on an ex parte basis. I issued a minute on 4 April 2025, summarising my conclusions and making the orders sought. I said I would provide reasons for doing so. These are my reasons.

Background

[4] On 24 May 2024, the Labour Inspector filed proceedings in this Court (the Court proceedings) commencing an action against KH68 Trading Ltd (KH68) and ALEX89 Ltd (ALEX89) as well as Thom Dao, Viet Hung Nguyen and Duong Alex Nguyen (the first, second and third respondents in the current application), in which she seeks an exercise of the Court's powers under pt 9A of the Employment Relations Act 2000 (the Act).

[5] In respect of KH68 and ALEX89 (which are not parties to the current application), the Labour Inspector seeks:

- (a) a declaration of breach pursuant to s 142B of the Act on the basis that the first and second defendants have breached minimum entitlement provisions and the breaches are serious; and
- (b) orders for pecuniary penalties pursuant to s 142E of the Act for serious breaches of minimum entitlement provisions; and
- (c) compensation orders pursuant to ss 142J and 142L of the Act to compensate aggrieved employees who have suffered loss and damage as a result of the serious breaches of minimum entitlement provisions.

[6] In respect of the third, fourth and fifth defendants (who are the first, second and third respondents in the current application), the Labour Inspector seeks:

- (a) a declaration of breach pursuant to s 142B of the Act on the basis that they have been persons involved in the first and second defendants' serious breaches of minimum entitlement provisions; and

- (b) orders for pecuniary penalties pursuant to ss 142E and 142X; and
- (c) compensation orders pursuant to ss 142J and 142L of the Act to compensate aggrieved employees who have suffered loss and damage as a result of the serious breaches of minimum entitlement provisions to the extent the first and second defendants are unable to pay; and
- (d) banning orders pursuant to ss 142M, 142N and 142O of the Act if the Court is satisfied that the defendants have persistently breached or persistently been involved in the breach of one or more employment standards.

[7] A statement of problem was simultaneously filed in the Employment Relations Authority seeking penalties in respect of alleged record-keeping breaches which are related to the alleged breaches before the Court. An application for removal to the Employment Court was filed at the same time.

[8] A statement of defence has not been filed in these proceedings due to a joint memorandum filed by counsel for the defendants and the Labour Inspector, seeking directions by consent:

- (a) granting an extension of time within which to file a statement of defence; and
- (b) directing that the parties attend a full-day mediation facilitated by the Mediation Service.

[9] The parties attended mediation as directed. It was then agreed that a further day of mediation would take place, which occurred in late February 2025. Counsel for the defendants advised the Court that discussions were ongoing. It was agreed that if no resolution was reached in principle within the following two weeks, the mediation process would terminate and the Court's pleadings timetable would come into effect.

[10] On 13 March 2025, KH68 and ALEX89 were put into voluntary liquidation.

[11] The Labour Inspector made inquiries and says that in addition to the voluntary liquidations, it has come to her attention through various means that:

- (a) KH68 and ALEX89 have sold their four businesses, being Professionail Henderson, Deluxe Nail and Spa Glenfield, Professionail Glenfield and Professionail New Lynn.
- (b) The businesses appear to have been sold for a value below their real value, and/or they may have been on-sold to family or friends “on paper” and could be operated by another legal entity with the first and second respondents remaining as the owners.
- (c) KH68 and ALEX 89 have sold five vehicles during the period they were engaged in mediation in relation to the Court proceedings.
- (d) The respondents have omitted to advise her of the sale of assets for KH68 and ALEX89.
- (e) The first and second respondents, being husband and wife, departed New Zealand on 22 January 2025 and have not returned.

[12] As a result of the above actions by the respondents, the Labour Inspector is concerned that there is a real risk that the assets of the respondents will be moved out of the jurisdiction or dissipated. She accordingly seeks an interim freezing order without notice to them.

[13] On 2 April 2025, the Labour Inspector applied to the Court for:

- (a) a freezing order in relation to the assets of the respondents in the terms set out in a draft order which was annexed to her application, pursuant to r 32.2 of the High Court Rules 2016;
- (b) an order dispensing with service of the application on any person;

- (c) an order dispensing with the requirement that the applicant give a signed undertaking as required by r 32.2(5) of the High Court Rules; and
- (d) an ancillary order requiring the respondents to each provide a schedule particularising their assets within 10 working days of the date of service of the orders of the Court.

Relevant principles

[14] 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 for in the High Court Rules.

[15] Part 32 of the High Court Rules is applied by this Court, therefore, with appropriate modifications. This means that a freezing order may be made under r 32.2.

[16] Rule 32.5 provides that the Court may make a freezing order against a respondent if an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable. In the case of a claim brought under the Act, the rule applies where the claim is brought in either the Authority or the Court.

[17] Numerous cases have established that in order to obtain such orders the applicant must satisfy four essential requirements:¹

- (a) the Labour Inspector has a good arguable case;
- (b) the respondents have assets within the jurisdiction;
- (c) there is a real risk that, unless restrained, the respondents will transfer or otherwise dissipate or dispose of their assets; and

¹ See for example *Borsboom v Preet PVT Ltd* [2016] NZEmpC 168 at [25]; and *A Labour Inspector of Ministry of Business Innovation and Employment v Jeet Holdings Ltd* [2019] NZEmpC 188 at [5].

- (d) the balance of convenience and interests of justice require the grant of interim relief.

[18] I turn now to consider those requirements.

Discussion

Good arguable case

[19] The Labour Inspector has filed an affidavit in support of her without notice application. It contains various factual assertions. The Court has not, of course, heard from the respondents. My consideration of factual matters is necessarily provisional. I also rely on the fact that counsel for the applicant provided the necessary memorandum under r 7.23 of the High Court Rules.

[20] The Labour Inspector conducted an investigation into the conduct of the respondents and the operations of KH68 and ALEX89. The investigation was conducted over the period 30 May 2023 to 9 April 2024 following complaints received from two employees. The investigation included interviewing witnesses, analysing wage and time records, reviewing photographs of rosters and copies of manual cash payslips, and reviewing text messages and work group chats.

[21] On 7 May 2024, the Labour Inspector sent a final investigation report and spreadsheets to the defendants in the Court proceedings (including the respondents in these proceedings). A copy of the final report, together with witness statements from three employees of KH68 and ALEX 89, are included in the Labour Inspector's supporting affidavit.

[22] The report sets out the findings that the Labour Inspector made in respect of the breaches of the Minimum Wage Act 1983, the Holidays Act 2003, the Wages Protection Act 1983 and the Act. She says that the defendants owe arrears to the two affected employees in the region of \$205,367.57.

[23] A claim for the arrears is set out in the statement of claim dated 24 May 2024 that was filed in the Court. As already noted above, penalties are also sought against

the first, second and third respondents as persons involved in serious breaches of minimum entitlement provisions by KH68 and ALEX89.

[24] As no statement of defence has been filed, the Court is unaware of the respondents' reply to the claims against them. I will deal with possible defences below. In any case, my consideration of factual matters can be provisional only.

[25] Standing back, I am satisfied that on the basis of the Labour Inspector's affidavit, she has a strongly arguable case in respect of the remedies she seeks.

Assets within the jurisdiction

[26] The Labour Inspector has deposed that KH68 and ALEX89 are currently in liquidation. She has attached the initial report of a liquidator for each company. It appears that the four businesses attached to those companies have recently been sold. However, there remain queries as to the terms of those sales.

[27] The respondents own significant assets of which the applicant is aware. In her affidavit, the Labour Inspector sets out a total of eight properties – five owned jointly by the first and second respondents, two owned by the second respondent and one owned by the third respondent.

[28] Accordingly, I am satisfied that the respondents have assets within the jurisdiction.

Risk of dissipation

[29] The applicant has submitted there is a real risk that, given the respondents' actions to date of selling the four business and various vehicles and placing the two companies in voluntary liquidation, the respondents will further seek to dissipate, diminish or otherwise place their assets out of reach if a freezing order is not granted.²

[30] The applicant submits that the respondents' omission to advise her of their intention to sell the four businesses and five vehicles demonstrates a real risk that the

² See above at [11].

respondents are reorganising their affairs in a manner that could place their assets out of reach should judgment be issued against them. Further, the applicant says the circumstances of the sale of the four businesses are of considerable concern.

[31] For present purposes, there is sufficient evidence to suggest that there is a risk of dissipation of the assets if a freezing order is not granted, at least for a limited period.

Balance of convenience/overall justice

[32] It is submitted by the applicant that freezing orders are necessary because of the real risk that the assets will be dissipated. She submits that if the respondents do not have assets against which judgment may be enforced, any judgment of the Court for the payment of arrears or penalties would be rendered nugatory.

[33] She also submits that any potential hardship that the respondents may incur is mitigated by r 32.6(3) of the High Court Rules, which provides that the freezing order must not prohibit the respondents from dealing with the assets covered by the order for the purpose 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 the respondents' business, including business expenses incurred in good faith.

[34] Further, the applicant submits that the making of ancillary orders requiring the respondents to serve on the applicant, within 10 working days, a schedule fully particularising their financial position and identification of their assets and their value, will enable the parties to refine the terms of any further freezing order (to cover a more limited range of assets) or make arrangements for the payment of security to the Court or into a trust account which would obviate the need for further freezing orders.

[35] I accept that if no order is made, the assets are sold and the proceeds are dissipated, the matters before the Court and the claims of the Labour Inspector on behalf of the affected employees could be rendered nugatory.

[36] Standing back, I am satisfied that the balance of convenience and overall justice favours the grant of an interim order.

No notice

[37] The applicant submits that it is appropriate for the application to proceed on a without notice basis in light of the recent actions of the respondents. It is submitted that if this application were to proceed on notice, there would be undue delay or prejudice to the applicant and that the interests of justice require the application to be determined without serving notice. I agree.

Undertaking as to damages

[38] As recorded in my minute dated 4 April 2025, no undertaking as to damages has been provided. The applicant submits that while an undertaking as to damages would generally be required, the requirement ought to be dispensed with in this case on the basis that the application is brought by the Crown. This is because the applicant is a statutory officer warranted under s 223 of the Act. It is submitted that the applicant is barred by s 65ZC of the Public Finance Act 1989 from providing a guarantee or indemnity on behalf of or in the name of the Crown unless she is especially authorised to do so. There is no express provision authorising the applicant to provide such an undertaking.

[39] However, there can be no suggestion that the applicant is not capable of meeting any costs or damages arising from this matter.

[40] On that basis, the applicant is excused from filing an undertaking on the basis that there are special circumstances.

Possible defences

[41] Compensation for arrears and penalties were sought against KH68 and ALEX89 (now in liquidation) in the Court proceedings. Penalties and other orders are sought against the first, second and third respondents. Now that KH68 and ALEX89 are in voluntary liquidation and may not be in a position to pay the arrears, orders will be sought against the respondents to pay those arrears.

[42] The applicant notes that the respondents may counter that they have not at this stage been identified as persons involved in breaches and that they are not personally liable for any arrears or penalties at this juncture. The applicant submits, however, that there is ample prima facie evidence of the first, second and third respondents' involvement in the breaches:

- (a) The first respondent is the sole director of KH68 and ALEX89 and was in a position exercising significant influence over the management and administration of the companies, including but not limited to her responsibility for recruitment, holiday and leave requests, and rosters.
- (b) The second and third respondents also had significant influence over the management and administration of KH68 and ALEX89, including drafting of employment agreements, processing of timesheets including hours/days worked and leave taken, and wage payments.

[43] In the absence of a statement of defence, or indeed any substantive response to the report, it is difficult to anticipate what the respondents' defences may be, either in general or as individuals. I expect they may deny the allegations against them. However, in the circumstances, that does not count against the making of the orders sought.

Application to amend the orders made on 4 April 2025

[44] Subsequent to the making of the orders referred to above, the applicant filed a memorandum on 8 April 2025 seeking that the orders be amended so as to provide clarity to the banks in relation to the bank accounts covered by the order and to

specifically refer to the properties known to be owned by the respondents. The applicant also sought the addition of a paragraph requiring that the banks provide her with account balances for all accounts covered by the order. She says that this will enable her to carry out the task of releasing funds for the purposes referred to in paragraph [33] above.

[45] Given that service has been effected on at least one respondent, I consider any further applications should be on notice and accordingly, decline to make the orders sought at this stage.

[46] I consider I am, however, able to provide clarification to assist third parties in the interpretation of the orders. The current orders at paragraph [6] require the banks to freeze any bank accounts “related to” or in the names of the respondents. “Related to” means bank accounts the respondents are the holder(s) of or are signatories to, or over which they have effective control.

Conclusion

[47] A freezing order was issued by the Registrar in the form provided under r 32.6(1) of the High Court Rules.

[48] I note that paragraph [11] of the order erroneously stated that the respondents were required, within two working days of service of the application, to serve on the applicant a schedule which fully particularises its financial position and identifies all assets and their value, when it should have been 10 working days.

[49] Amending the timeframe to provide more time will not prejudice the respondents. On the contrary, such extension is in their favour. Accordingly, I consider I am able to make the amendment in this judgment.

[50] I order that the respondents have 10 working days to serve such a schedule.

[51] I direct:

- (a) A copy of the order, this judgment, my minute of 4 April 2025, and all documents filed by the Labour Inspector are to be served on the respondents as soon as possible.
- (b) The order is interim only and will lapse at 4 pm on Tuesday 29 April 2025, unless it is further extended by order of the Court at the hearing at 10 am on Monday 28 April 2025. That hearing may be by telephone. If the respondents wish the Court to consider factual assertions, these will need to be in affidavit form and will need to be filed and served by midday on Thursday 24 April 2025.
- (c) The Court is to be advised as soon as the documents referred to in subparagraph (a) above are served. This judgment is to be published after that notification has been received. An affidavit of service is also to be filed.

[52] Costs are reserved.

Kathryn Beck
Judge

Judgment signed at 11.30 am on 9 April 2025