



Employment Court of New Zealand

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BD v FG [2022] NZEmpC 94 (26 May 2022)

Last Updated: 8 June 2022

ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE APPLICANT AND FIRST RESPONDENT IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2022\] NZEmpC 94](#)
EMPC 164/2022

IN THE MATTER OF	an ex-parte application for freezing and ancillary orders
AND IN THE MATTER OF	an application for non-publication order
BETWEEN	BD Applicant
AND	FG First Respondent
AND	ANZ BANK NEW ZEALAND LIMITED Second Respondent

Hearing: 26 May 2022
(Heard at Wellington by telephone)

Appearances: R Pinney and J Crengle, counsel for applicant

Judgment: 26 May 2022

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application for freezing and ancillary orders) (Application for non-publication order)

Introduction

[1] The applicant company (BD) has applied, without notice, for a freezing order against one of its employees (FG), and ancillary orders against the second respondent, ANZ Bank New Zealand Limited.

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[2] I heard from counsel for BD today on an urgent basis.

[3] The Employment Court may make freezing and ancillary orders and has the same powers as the High Court as provided in the High Court Rules: [1 s 190\(3\)](#) of the [Employment Relations Act 2000](#). An application must be advanced in the Employment Court because the Employment Relations Authority has no power to make such orders. [2](#)

[4] Generally, an application will be supported by either a statement of problem filed with the Authority or a draft proceeding. No proceeding has been filed in the Authority and no draft statement of problem has been filed either. It has, however, previously been accepted that this step is not necessary where, for example, the matter is of such urgency or the failure to file has been adequately explained. [3](#) I accept that an adequate explanation has been provided in this case. Matters are at a preliminary, investigative, stage and the applicant wishes to engage with the first respondent (who is very unwell)

before filing proceedings. What is very clear is that there is a potential claim squarely within the jurisdiction of the employment institutions.

[5] A written and signed undertaking as to damages has been filed in support of the application, together with affidavit evidence of the applicant's financial ability to meet an order for damages pursuant to the undertaking. The applicant has also filed, as required, a draft order which refers to the undertaking as to damages.

Framework for analysis

[6] The applicant must show:

- (a) a good arguable case on a cause of action;
- (b) there are assets of the respondent to which the order can apply;
- (c) there is a real risk of dissipation.

1 [High Court Rules 2016](#), rr 32.2 and 32.3.

2 [Employment Relations Act 2000, s 160\(4\)](#).

3. See Employment Court Practice Directions www.employmentcourt.govt.nz at No 8; *Mason Engineers (NZ) Ltd v Hodgson* [2011] NZEmpC 82 at [3]; and *A v B* [2021] NZEmpC 118 at [36].

[7] The need to protect the applicant from a barren judgment must be balanced against any prejudice or hardship to the respondent and/or third parties. Consideration must be given to the overall interests of justice.

[8] Once made, a freezing order restrains a party from removing assets located in or outside New Zealand, or disposing, dealing with or diminishing the value of those assets.

Analysis

[9] I am satisfied, having read the affidavit filed in support of the application, that there is a good arguable case that the first respondent has made a series of unauthorised payments totalling over \$67,000 from the applicant's bank account to other accounts, one of which is her personal bank account. This appears to be supported by various bank records before the Court. There is a good arguable case that such payments were in breach of the first respondent's terms and conditions of employment.

[10] Three accounts have been identified by the applicant, one of which is an account that the first respondent's salary is paid into. While the applicant does not know who the account holder/s are of the other two accounts, there is reason to believe (given the way in which a number of transactions have been made and the size of them) that the first respondent is an account holder or controls them.⁴

[11] I accept, based on the material currently before the Court, that there is a real risk that the first respondent will move to dissipate any funds held in the identified accounts and/or take steps to frustrate recovery if the orders sought are not made. The apparent history of unauthorised transactions; the concealment of this activity; the way in which payments have been made to affected employees where insufficient funds have otherwise been unavailable; and the limited assets held by the first respondent support this view.

⁴ See *A v B*, above n 3, at [38].

[12] I am satisfied too that it would be just to make the ancillary orders sought for the purposes of eliciting information relating to assets relevant to the freezing order.⁵

[13] I do not overlook the potential impact of the making of freezing orders on the first respondent. That impact is, to some extent, mitigated by the fact that she currently remains employed by the applicant company on full pay; provision being made within the orders for her ordinary living expenses; the applicant's undertaking as to damages; and an ability to apply on short notice to the Court for a variation of the orders.

[14] The balance of convenience and overall interests of justice support the making of the orders. If the orders are not made the applicant will be left exposed, which will undermine its ability to obtain a clear picture at an early stage as to where the money said to have been appropriated has gone, and impede its ability to take recovery action.

Non-publication

[15] The applicant seeks interim non-publication orders for itself and the first respondent. I am satisfied that it is appropriate to make the orders sought, including having regard to the untested nature of the matters at issue, the fact that

the first respondent has not had an opportunity to be heard, the fact that she is suffering from serious ill-health, and the gravity of the allegations. I accept that identifying the applicant could lead to identification of the first respondent.

[16] An interim order is accordingly made under cl 12 of sch 3 of the [Employment Relations Act](#) preventing publication of the name and identifying details of the applicant and first respondent in these proceedings. A further order is made that, until further order of the Court, the Court file is not to be inspected by any person without leave of a Judge.

Order

[17] I am satisfied that the orders in the form submitted with the application should be made subject to modifications made during the telephone hearing today.

5 [High Court Rules 2016](#), r 32.3.

[18] I direct that the applicant is to serve a copy of all documents filed in the Court, as well as a copy of the orders made, and this judgment, on each respondent as soon as possible.

[19] The freezing order will have no effect after 2 June 2022 unless on that date it is continued or renewed.

[20] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 2.30 pm on 26 May 2022

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