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Kang v Lee [2020] NZEmpC 37 (27 March 2020)

Last Updated: 6 April 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 37](#)

EMPC 103/2020

IN THE MATTER OF an application for freezing and
 ancillary orders
BETWEEN YOUNG GOO KANG
 Applicant
AND KYOUNG YONG LEE
 Respondent

Hearing: 26 March 2020 (by telephone conference and
 subsequent submissions)

Appearances: S Kang, counsel for applicant

Judgment: 27 March 2020

REASONS JUDGMENT OF JUDGE K G SMITH

[1] On 26 March 2020, I granted the application by Young Goo Kang made without notice for a freezing order and an ancillary order against Kyoung Yong Lee, affecting his assets. These are the reasons for those orders.

[2] Mr Young Kang is the applicant in a proceeding between him and Mr Lee in the Employment Relations Authority, claiming arrears of wages and holiday pay arising from his employment with a company called NZMEC Ltd.

[3] NZMEC is in liquidation. Mr Lee was its sole director and shareholder. In the Authority Mr Young Kang seeks to recover from Mr Lee the amount of his unpaid wages and holiday pay relying on ss 142Y and 142W of the Employment Relations

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Act 2000 (the Act). Under the former section an employee may recover from a person who is not the employer any wages or other money payable to him or her, if there has been a default in payment and that was due to a breach of employment standards. The person from whom the payment is sought must be involved in the breach within the meaning of s 142W.

[4] Section 142W defines a person as being involved in the breach of an employment standard if:

- (a) he or she has aided, abetted, counselled or procured the breach; or
- (b) has induced the breach; or
- (c) has been in any way, directly or indirectly, knowingly concerned in or party to the breach; or
- (d) has conspired with others to effect the breach.

[5] It is because of Mr Lee's position as a director of NZMEC that he is being pursued by Mr Young Kang in the Authority.

[6] Mr Young Kang was employed by NZMEC between 3 April 2017 and 30 November 2018. He was the company's office manager. His employment ended when the company was placed in liquidation in early December 2018.

[7] As at the date of Mr Young Kang's application in the Authority he claimed to be owed the following amounts:

- (a) unpaid wages of \$20,833; and
- (b) unpaid holiday pay of \$5,551.25.

[8] The reason Mr Young Kang considered Mr Lee to be liable to pay the amounts owed by NZMEC was because, he says, there has been a breach of employment

standards.¹ Mr Young Kang's application is based on Mr Lee being the sole director of the company, responsible for managing its business. In this application he deposed to Mr Lee being the person responsible for employing him, signing the employment agreement on behalf of the company, and supporting his application for a visa.

[9] Mr Lee was said to have actual knowledge of the company not paying any wages or holiday pay. An example of this knowledge was that Mr Lee raised the absence of payment with Mr Young Kang and initiated discussions about it before the company was placed in liquidation.

[10] Mr Young Kang explained that the wages and holiday pay debt accrued over seven months before the company was placed in liquidation. Despite not being paid, he continued to work for reasons which do not need to be elaborated on but can generally be described as because of a friendship with Mr Lee and promises made by him that payment would be made in the near future. It appears that in December 2018, immediately following the liquidation, Mr Lee made two payments of wages to Mr Young Kang.

[11] The proceeding in the Authority is defended and Mr Lee denies liability.

Urgency

[12] This application has been considered urgently, without notice, because of a recent turn of events in the Authority, giving rise to concerns about Mr Lee's intentions.

[13] The investigation meeting is scheduled for 6 April 2020. Preparation is well advanced. The parties have filed and served briefs of evidence and, in all respects, matters appear ready for the Authority to consider. Against that background, Mr Lee has belatedly sought an adjournment of the meeting, claiming that he has an urgent need to travel to South Korea. The explanation offered to the Authority to support this request was that he has business interests in New Zealand that are in some way funded by the Government of South Korea and it is necessary for him to attend, in person, in

1. See [Employment Relations Act 2000, s 5](#); includes minimum entitlements and pay under the [Holidays Act 2003](#) and under the [Minimum Wage Act 1983](#).

South Korea to ensure that this funding continues. What was concerning to Mr Young Kang is the lateness of this request for an adjournment, the reason offered to support it (which he doubts), and the fact that there have been recent changes in Mr Lee's financial situation all of which suggest that he is preparing to leave New Zealand with his assets. That request for an adjournment has been made very late, just prior to the investigation meeting. Submissions about the application are due today.

The application for freezing and ancillary orders

[14] Mr Young Kang applied for orders freezing the assets of Mr Lee in New Zealand without notice. He sought:

- (a) a freezing order relating to Mr Lee's New Zealand assets; and
- (b) an ancillary order requiring the disclosure by Mr Lee of information about the assets he holds, and those held by Mr Lee's wife in relation to which there may be a relationship property claim.

[15] In discussions with counsel for Mr Young Kang, Mr Seungmin Kang, it appears that the application for an ancillary order was made out of a concern that property may have been transferred between spouses, as part of a scheme to deprive the applicant of an ability to execute any determination in his favour.

Freezing orders

[16] Section 190(3) of the Act provides the Court with the same powers to make freezing orders as the High Court has. The High Court Rules are applied with modifications. Rule 32 of the High Court Rules is applied by this Court, subject to appropriate modifications. A freezing order may be made under High Court r 32.2 and an ancillary order may be made

under r 32.3.

[17] High Court r 32.5 allows a freezing order to be made against a prospective judgment debtor. Specifically, r 32.5(1)(b) allows an order to be made if the applicant has a good arguable case on an accrued or prospective cause of action.

[18] Mr Young Kang's application is predicated on his belief that his claim against Mr Lee in the Authority will be successful. In that sense he is a prospective judgment creditor and Mr Lee is a prospective judgment debtor within the meaning of r 32.5.

[19] The fact that the orders are sought for an Authority investigation does not prevent them from being made. The Court has previously granted freezing orders in similar situations and s 160(4) of the Act expressly precludes the Authority from making a freezing order.²

[20] To succeed in the Authority Mr Young Kang will need to be granted leave to proceed against Mr Lee, establish that there has been a breach, and satisfy it that Mr Lee falls within the statutory requirements of a person involved in the breach as specified in ss 142Y and 142W.

[21] The test to apply to obtain a freezing order has four parts to it:

- (a) there is a good arguable case;
- (b) the respondent has assets within the jurisdiction;
- (c) there is a real risk the property will be moved out of the jurisdiction or dissipated; and
- (d) that the balance of convenience and interests of justice require the order be granted.

[22] Each is considered in turn.

Good arguable case

[23] I am conscious that this application has been heard under urgency and, in those circumstances, without participation by Mr Lee. The views expressed in the balance

2. *Amien v Reipen* [\[2011\] NZEmpC 124](#); *Marryatt v Silver Ridge Group Ltd (No 2)* [\[2017\] NZEmpC 126](#).

of this judgment are, therefore, entirely dependent on what has been said by Mr Young Kang in his affidavit.

[24] Mr Kang submitted that there is a good arguable case for the order because:

- (a) it is likely Mr Young Kang will establish all of the required ingredients for the Authority to make an order in his favour, imposing liability on Mr Lee; and
- (b) at all times Mr Lee was the sole director of NZMEC having responsibility for the management and administration of the company. In that position he knew that Mr Young Kang was continuing to work and was not being paid wages or, for that matter, holiday pay.

[25] The Authority received a report from NZMEC's liquidator describing the expected shortfall and payments that will be made to preferential creditors. Mr Young Kang has been identified as entitled to a distribution from the company's estate for unpaid wages and holiday pay. That report is confirmation of the employment relationship and that the company remains indebted to Mr Young Kang. I accept Mr Kang's submission and consider that Mr Young Kang has established that he has a good arguable case that, not only was NZMEC in breach of employment standards, but that Mr Lee was at least directly or indirectly involved in those breaches.

[26] The first part of the test is satisfied.

Assets in the jurisdiction

[27] The second part of the test is for Mr Young Kang to establish that Mr Lee has assets in New Zealand. The evidence about the nature and extent of Mr Lee's assets in New Zealand was understandably imprecise, but it is sufficient to enable the order to be made. Mr Young Kang deposed to knowing that Mr Lee had a private home in Auckland but it has recently been the subject of a mortgagee sale. The details of that sale are sketchy. It is apparent that the mortgagee exercised its rights under the mortgage which would suggest a failure to pay mortgage instalments as they fell due. If the state of Mr Lee's finances meant that matters had reached the stage where the

mortgagee was exercising its rights over this security, it is likely that, in addition to missed mortgage payments, there will be accrued interest payments and costs associated with the sale itself. None of that information was available to Mr Young Kang to support this

application.

[28] Mr Kang submitted that the property, although sold at mortgagee sale, was sold at its market value. He said that was slightly more than \$1m. From that proposition he submitted that it is likely there will be a surplus that would create a fund that satisfies this part of the test. I do not accept that submission. There is no evidence which would support such a conclusion. It involved speculation about the extent of Mr Lee's indebtedness and what the mortgagee sale costs were.

[29] There is, however, further evidence of assets in the jurisdiction sufficient to support this application. First, Mr Lee's request for an adjournment of the investigation was to allow him to travel to and from South Korea. He told the Authority he was travelling for business and that the purpose of this trip was to secure funding for his business in New Zealand. That suggests ongoing business interests and potentially business assets. Second, I am prepared to infer that Mr Lee has available to him funds for an airfare to South Korea. The source of those funds is unclear but there has been no indication, at least in what was said to the Authority, that the trip would be paid for other than out of resources available to Mr Lee.

[30] Third, Mr Lee has an interest in Taupo Language and Outdoor Education Centre Ltd. Mr Young Kang has deposed to the business trading in Taupo at least until recently when an annual return was not filed. Mr Lee's interests in that company are an asset within the jurisdiction.

Risk of removal or dissipation

[31] What has prompted this application is Mr Lee's request to adjourn the Authority's investigation meeting and the reason given. The request to adjourn was not supported by any information explaining the nature of the funding he is to travel to secure, why he has to travel now, or why securing it needed him to attend in person in South Korea. Mr Lee informed the Authority that he usually travels to South Korea

in March each year to secure the funding. What makes the request concerning to Mr Young Kang is that he believes the reason is implausible because:

(a) Mr Young Kang is also a South Korean citizen and he is not aware of any arrangements where the South Korean Government funds businesses in a way claimed by Mr Lee.

(b) If there was such a commitment to return to South Korea Mr Lee must have known about it before accepting a date for the investigation meeting.

(c) It is difficult to understand how such a pressing need to travel could arise in a situation where both South Korea and New Zealand have undertaken extreme measures to attempt to halt the spread of COVID-

19. Mr Lee informed the Authority that he would not be able to travel until after 29 March 2020 but that offers little comfort. He still intends to travel. While there are heavy restrictions on the movement between South Korea and New Zealand, it is still technically possible to travel between these countries.

(d) There was no explanation by Mr Lee as to why this funding is so urgent that it needs his attention, and presumably the attention of the Government of South Korea, during these extreme times.

(e) In any event, there is evidence that Mr Lee is winding down his business affairs in New Zealand. His home has been compulsory sold. The company that employed Mr Young Kang has been liquidated, and the other business interest in Taupo is run by a company that has not filed an annual return, suggesting that it is no longer seen by Mr Lee as being necessary for his business interests.

[32] I conclude that the reasons advanced for the adjournment give rise to a real concern that the object of the exercise is to delay the investigation to assist Mr Lee's departure and to deprive Mr Young Kang of any benefit he could obtain from an

Authority determination. Mr Lee informed the Authority that he would be able to return for a hearing in June 2020, but that stated preparedness to return is not sufficient to quell disquiet about what had been said previously.

[33] I am satisfied that there is a risk Mr Lee's assets are being removed from New Zealand.

Balance of convenience and overall interests of justice

[34] In my view if the assets of Mr Lee were removed or dissipated, there is a substantial risk that any determination by the Authority will be rendered nugatory. That would be contrary to the interests of justice given the significance of the breach of minimum standards.

[35] The Court also has to consider the potential hardship to the respondent if a freezing order was made although that is, to an extent, ameliorated by applying r 32.6(3). That rule provides that the order does not prohibit the respondent from dealing with assets covered by the order for the purposes of paying ordinary living expenses, legal expenses related to the freezing order or for disposing of assets or making payments in the ordinary course of business including business expenses incurred in good faith.

[36] In the circumstances which have been described by Mr Young Kang, I am satisfied that the balance of convenience favours making the order but not for the amounts sought.

[37] Stepping back, I am satisfied that the overall interests of justice support making a freezing order.

Ancillary order

[38] The ancillary order as originally applied for was broad in scope. It referred to any assets in which Mr Lee might have a relationship property interest with Mrs Lee.

[39] Mr Kang, in his submissions, was not able to refer to any evidence, or for that matter any case, where an ancillary order had been made in relation to property owned

by a spouse of a prospective judgment debtor. The application is, to that extent, speculative. Mr Young Kang did not, for example, give any evidence about knowledge of assets that were once owned by Mr Lee but which have now been passed to Mrs Lee. In the circumstances, despite Mr Kang's submission that the application could extend to Mrs Lee, I am not satisfied that it should.

[40] The purpose of the ancillary order was otherwise to obtain further information about the nature and extent of Mr Lee's assets in New Zealand. As has already been indicated, I accept that he has assets in New Zealand and that it is appropriate for the extent of those assets to be fully and accurately disclosed. That includes the interest he has in Taupo Language and Outdoor Education Centre Ltd. For those reasons I have modified the order requiring Mr Lee to state the assets he has, particularly relating to that company, and to do so within seven days.

Outcome

[41] I accept that a freezing order and an ancillary order should be made subject to modifications to follow.

[42] Mr Young Kang's application sought to freeze the value of Mr Lee's assets to the sum of \$24,358.26. That was calculated on the basis of five months unpaid wages and holiday pay but taking into account a potential recovery from the liquidation which is likely to be in the region of approximately \$17,000. Making an allowance for what the liquidator will eventually pay Mr Young Kang the unpaid shortfall is about \$9,300. Part of this calculation of the amount sought in the order reflected what was said to be costs and disbursements likely to be imposed by the Authority if Mr Young Kang is successful. The balance of this claim is made up of the maximum that can be awarded for a penalty which is \$10,000.

[43] I am not satisfied it is appropriate to assume the Authority will impose a penalty or, if it does, it would be the maximum amount. There was no evidence provided by Mr Young Kang to explain why the Authority's discretion might be exercised in this way and it would not be appropriate to make such an order.

[44] However, it is appropriate to recognise that the order should protect the unpaid shortfall of Mr Young Kang's wages and holiday pay and a modest allowance for costs. Those assessments led me to conclude that it would be appropriate, at least at this stage, for the order to be for a sum of \$14,000.

[45] The ancillary order is modified to exclude Mrs Lee's assets.

[46] The orders which were made and issued are in the form submitted with the application subject to the modifications in this judgment.

[47] As this is an interim order only it will lapse at **5 pm on Wednesday 1 April 2020** unless it is further extended by order of the Court. The orders made in this judgment will be reviewed at a conference conducted at **9.30 am on that day**. The current COVID-19 emergency requires that the hearing at that time will be by telephone.

K G Smith Judge

Judgment signed at 3.20 pm on 27 March 2020

