Employment Court of New Zealand

Kang v Saena Company Limited [2022] NZEmpC 36 (8 March 2022)

Last Updated: 11 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2022] NZEmpC 36
EMPC 60/2022

IN THE MATTER OF	an application for freezing and ancillary orders
BETWEEN	HUNMO KANG Applicant
AND	SAENA COMPANY LIMITED First Respondent
AND	NABORN COMPANY LIMITED Second Respondent
AND	GYU ILL HWANG Third Respondent
AND	OKSIL WEON Fourth Respondent

Hearing:	3 March 2022 (Heard by Audio Visual Link)
Appearances:	S Kang, counsel for applicant No appearance for respondents
Judgment:	8 March 2022

JUDGMENT OF JUDGE K G SMITH

(Application for freezing orders and ancillary orders)

[1] Hunmo Kang has applied without notice for freezing orders and ancillary orders against each of the respondents. Mr Kang is suing his former employer, Saena Company Ltd, alleging he was unjustifiably disadvantaged and unjustifiably dismissed from his job at the company's Whangarei restaurant.

[2] What has prompted these applications is the plaintiff's concern that Saena is divesting itself of the restaurant business to avoid the potential consequences if the claim succeeds.

[3] Mr Kang's claim is a challenge to a determination of the Employment Relations Authority where he was unsuccessful.1 The challenge is due to be heard on 11 and 12 April 2022.2

[4] The claims against Saena are for the recovery of lost wages under s 128 of the Employment Relations Act 2000 (the Act) of $3,351.06 and compensation for alleged humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of a further $20,000. A penalty is sought against Saena with an application for all or some of that penalty to be payable to Mr Kang.

[5] The proceeding is defended by Saena and it denies liability to Mr Kang.

[6] The second, third and fourth respondents in this application, Naborn Company Ltd, Gyu Ill Hwang and Oksil Weon are not parties to the challenge. They were not parties in the Authority's investigation. In this application Naborn is suspected of having either acquired or taken control of Saena's restaurant business which gives rise to the application for freezing orders and ancillary orders against it. Mr Hwang and Ms Weon are shareholders in Saena. Freezing orders and ancillary orders are sought against them because they may control the business and/or have received any proceeds of sale.

Request for urgency

[7] The application was filed on 1 March 2022. Urgency was granted and the application was considered at a hearing with counsel, Mr Seungmin Kang, on 3 March 2022.

1 *Kang v Saena Company Ltd* [2021] NZERA 196 (Member Campbell).

2. The Authority's subsequent costs determination (*Kang v Saena Company Ltd* [2021] NZERA 274 (Member Campbell)) is challenged in an amended statement of claim.

The application for freezing and ancillary orders

[8] Mr Kang applied for a suite of orders affecting the property of each of the respondents. The application sought freezing orders and ancillary orders against all of them as follows:

(a) A freezing order preventing all of the respondents from diminishing the value of their assets and funds in New Zealand to less than $62,465.06 until a review date fixed by the Court.
(b) Ancillary orders against all of the respondents requiring them to:
(i) produce full information of their assets and liabilities in New Zealand;
(ii) provide advice about whether a business, trading as BooBoo Sushi, is being operated by Naborn and, if so, whether that was the result of a sale and purchase between it and Saena;
(iii) if there was a sale, provide information about when that happened and the amount of the transaction;
(iv) state whether Saena retained the proceeds of any sale or if they have been distributed to Mr Hwang and Ms Weon;
(v) state the company's assets and liabilities if there has been a distribution of sale proceeds by Saena; and
(vi) produce all business and personal bank statements from 7 November 2021, to the date of the sale of the business, if that has occurred, and the sale and purchase agreement (if any) and "any other relevant documents".

[9] The basis for the freezing and ancillary orders against Saena was a concern that there was a danger a prospective judgment will be wholly or partly unsatisfied if the

restaurant business, if it has not yet been sold, or any sale proceeds not yet distributed, will be disposed of, dealt with or diminished in value if orders are not made.

[10] In relation to the second respondent, Naborn, the claim is that there was a danger a prospective judgment will be wholly or partly unsatisfied because it is in possession of, or in a position of control or influence concerning, the assets of Saena. The basis for this claim was that there may be a court process ultimately available to Mr Kang as a result of a judgment or prospective judgment under which Naborn may be obliged to disgorge assets or contribute towards satisfying the judgment.

[11] In the case of the third and fourth respondents, Mr Hwang and Ms Weon, the same basic allegation was made; that there is a danger a prospective judgment will be wholly or partly unsatisfied. The claim was based on an assertion that they hold the power to dispose of Saena's assets, and that there may be a process available under which they may be obliged to disgorge assets or contribute towards satisfying the judgment.

[12] The amount sought to be protected by the freezing and ancillary orders was

$62,465.06. That sum combined the amount claimed and an estimate of costs calculated on a Category 2B basis.3

Power to make freezing orders

[13] Section 190(3) of the Act provides the Court with the same powers to make freezing orders as applies in the High Court.

The High Court Rules 2016 are applied to an application in this Court with appropriate modifications.

[14] Rule 32.2 provides for freezing orders. Rule 32.3 provides for ancillary orders. A freezing order may be made against a prospective judgment debtor.4 Mr Kang's application contemplates that his challenge to the Authority's determination will be successful, so that he is a prospective judgment creditor and Saena is a prospective judgment debtor. The power to make ancillary orders against third parties, that is the other respondents, arises from r 32.5.

3 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

4 High Court Rules 2016, r 32.4.

[15] The test to apply in considering these applications requires Mr Kang to establish:

(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 disposed of, or diminished in value; and
(d) the balance of convenience and the interests of justice favour making the orders.

Good arguable case

[16] This application was heard urgently and without notice to any of the respondents. That means responses to the application have not been heard and, consequently, relies on Mr Kang's uncontested evidence.

[17] In Mr Kang's affidavit supporting the application he explained how his employment at Saena's restaurant, BooBoo Sushi, came to an end. He began working for the restaurant in mid-September 2019. Mr Kang's wife also worked there.

[18] According to Mr Kang, on 21 October 2019 his wife was told by Mr Hwang to "get out" as an instruction to leave the restaurant. His evidence was that this instruction followed Ms Weon raising her voice to his wife and criticising both of them. The evidence continued that he tried to carry on working but was angrily told by Mr Hwang to "get out as well". Having no other choice he left.

[19] Later that day there was an exchange of text messages. In them Mr and Mrs Kang asked what they should do about work the following day. The response to the message translated as "let's go our separate ways". Mr Kang's evidence was that later in the evening he saw two advertisements placed by the company on a Korean language website seeking employees to perform the work previously undertaken by him and his wife.

[20] Over the next week or so there were attempts to renegotiate a resumption of work. As part of these negotiations Mr Kang was provided with a draft employment agreement but its terms were unacceptable to him. He deposed to Ms Weon repeating, during negotiations, that she was not happy for him to return to work and that they should go their separate ways. Mr Kang declined the offer to resume employment.

[21] The claim of unjustified dismissal arises from how and why Mr Kang was told to leave the restaurant. His claim is that it was a by-product of a disagreement between his wife and Ms Weon and without justification.

[22] The disadvantage grievance arises from a claim that Mr Kang was not provided with a written employment agreement before one was offered to him in contemplation of resuming work. This omission meant he did not know the terms and conditions on which he was employed.

[23] Mr Kang was unsuccessful in the Authority. The Authority held that he was not dismissed, finding that being told to leave was more likely than not encouragement to him to support his wife who was upset.5 The text about going their own ways the Authority concluded may have amounted to a dismissal, if it had not been followed immediately by another text which raised a question about whether Mr Kang initiated the ending of the employment relationship when he expressed an intention to leave his job.6 The Authority was not satisfied that on 21 October 2019 there was a sending away amounting to a dismissal.7

[24] There was a fallback position. The Authority held that even if what happened on 21 October 2019 was a dismissal, it was reasonable to examine the actions taken after the parties had an opportunity for a "cooling down period".8 What followed in the determination was an analysis of the communication that occurred after 21 October 2019.9

5 *Kang*, above n 1, at [16].

6 At [18].

7 At [19].

8 At [20].

9 At [21].

[25] Mr Seungmin Kang, counsel for the plaintiff, submitted that there is a good arguable case for unjustified dismissal based on what occurred on 21 October 2019. His submissions fell into two parts. First, because a dismissal occurred when Mr Kang was instructed to leave or subsequently by communication from the company about going separate ways. The submission was that separately or in combination they amounted to an unequivocal "sending away" and were part and parcel of a dismissal.

[26] The second part of this argument was that the Authority should not have relied on a cooling off period. In the past, a cooling off period has been sometimes seen as appropriate where an employee makes a seemingly ill-considered or irrational decision to resign in the heat of the moment when it ought to have been apparent to the employer that despite the words or conduct the employee was not resigning. Counsel argued that a cooling off period has not been applied previously where an unequivocal decision has been made by the employer.10

[27] I agree that there is a good arguable case that Mr Kang was unjustifiably dismissed. Mr Kang's evidence, if accepted by the Court, is capable of supporting a claim of unjustified dismissal.

[28] It would not be appropriate to make any further comments about the circumstances as described, given the proximity of the substantive hearing where the company disputes liability. Mr Kang has established the first aspect of this test insofar as Saena is concerned.

[29] I am not satisfied, however, that there is a good arguable case for freezing orders against Naborn, Mr Hwang and Ms Weon. The connection between them and Mr Kang's action against Saena is tenuous. The claim against Naborn involves assumptions that it has acquired the restaurant business and, if it has, that there may be an action in future by Mr Kang against it under the Companies Act 1993.

[30] There is a potential liability for Mr Hwang and Ms Weon, if subsequent action establishes that they have liability as persons involved in a breach under ss 142W and 142Y of the Act, although that would be confined to claims arising due to breaches of

10. In any event as to doubt about a cooling off period see *Mikes Transport Warehouse Ltd v Vermuelen* [2021] NZEmpC 197.

employment standards such as unpaid wages and holiday pay, and it would not apply to monies awarded as compensation or arising from penalties.11

[31] The reality is that the applications about the second, third and fourth respondents concentrated on a request for ancillary orders compelling them to provide information.

Assets within the jurisdiction

[32] The second part of the test is for Mr Kang to establish that Saena has assets in New Zealand. Clearly it does. The restaurant business in Whangarei satisfies this requirement.

Risk of removal or dissipation

[33] Mr Kang has difficulty with this part of the application. It rests on several assumptions not adequately supported by evidence. The risk identified is that Saena has divested itself of the only asset he knows it owns which is the BooBoo Sushi restaurant in Whangarei, or is in the process of doing so. The evidence about what the company is doing, or has done, was circumstantial.

[34] After being dismissed, Mr Kang moved to the Bay of Plenty for work. He acknowledged, appropriately, that since moving away from Whangarei he had not heard much about Saena's business but thought it was still operating the restaurant. His reason for that conclusion was that the company declined his suggestion of holding the Authority's investigation meeting in Auckland, as a midway point between them. He understood this invitation was rejected because the need to continue to run the business precluded travelling to Auckland.

[35] That changed recently when he was informed by an unnamed friend, who also moved from Whangarei to Bay of Plenty, that Mr Hwang no longer operated the restaurant and had moved to Auckland. That was as far as this information went.

11 See the definition of "employment standards" at s 5 of the Employment Relations Act 2000.

[36] The information caused other inquiries to be made. Company searches undertaken of Naborn show it was incorporated on 26 July 2021. Its only shareholder is Saeyeon Hwang, who is the daughter of Mr Hwang and Ms Weon.

[37] A company search undertaken of Saena shows that there were changes to its shareholding on 17 February 2022. A

share transfer divided the shareholding equally between Mr Hwang and Ms Weon. Previously all of the shares were owned by Mr Hwang. Mr Hwang is listed as having an address in Whangarei. Ms Weon is listed as having an address in Auckland.

[38] Counsel submitted that inferences could be drawn from changes to the shareholding in Saena, and the date of the incorporation of Naborn, sufficient for the purposes of establishing that there is a risk of a prospective judgment being defeated. The concern was not about the change to the shareholding in Saena but the fact that each of the directors gave different addresses. The inference invited to be drawn from the share transfers was that those addressed could show that the shareholders are in the process of relocating to Auckland leaving the restaurant to be operated by Naborn. That was coupled with an observation that there was no repetition of the previous objection to this dispute being heard in Auckland when the challenge was allocated hearing time.

[39] The link to Naborn and the possibility it has taken over the restaurant comes from two sources. First, because its only shareholder is the daughter of Mr Hwang and Ms Weon. Second, because advertisements for employees to work at BooBoo Sushi invited applicants to reply to a Gmail address belonging to Naborn suggesting it is running the business.

[40] The timing of the incorporation of Naborn, and its proximity to the date of the Authority's determination and when the challenge was filed, completed this picture. The determination was issued on 11 May 2021 and the challenge was filed on 8 June 2021. Naborn was incorporated in July 2021.

[41] The burden is on the plaintiff to satisfy the Court that there is a prospect that the assets will be removed, dissipated or diminished in value. The test is not unduly

exacting. In *Murren v Schaeffer* the Court of Appeal considered this aspect of the test and commented:12

The second stage requires the Court to be satisfied there is a danger that judgment will not be satisfied because assets may be removed or dealt with in a way that frustrates the judgment. ...

[42] The Court went on to observe that the test could be put in the following way:13

...The plaintiff must point to circumstances from which a "prudent, sensible commercial man, can properly infer a danger of default". ...

[43] It is not enough, however, to infer a risk of dissipation merely because the defendant "plays its financial cards close to its chest".14 Mere suspicion is not enough.15 An assertion of a belief that a respondent will dissipate its assets unsupported by solid grounds justifying that belief is insufficient.16

[44] The application for freezing and ancillary orders relies on drawing inferences that involves assumptions without adequate support.

[45] The change in share structure in Saena is neither here nor there; rather than the shares being held by Mr Hwang they are now equally divided between him and Ms Weon. By itself or in combination with the other grounds relied on that does not suggest steps being taken to defeat a future judgment.

[46] The invitation to infer an intention to defeat a judgment from the change of address for one shareholder, from Whangarei to Auckland, draws a very long bow. There may be any number of innocent reasons for shareholders changing addresses.

[47] All that leaves is advertisements placed for staff for the restaurant with an email address to Naborn and the timing of the establishment of that business. That evidence may support a suspicion about an underlying transaction trying to move Saena's assets

12 *Murren v Schaeffer* [2018] NZCA 318 at [16].

13 At [16] citing *Third Chandirs Shipping Corp v Unimarine SA* [1979] QV 645 at 671.

14. Referring to *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh"* [2001] 2 NZLR 801 (HC) at [122].

15 *Euro-National Corporation Ltd v NZI Bank* (1991) 4 PRNZ 365 (HC) at 372

16. *Miyamoto International New Zealand Ltd v Foster Street Properties Ltd* [2015] NZHC 3086 at [23](c).

out of reach but no more than that. I am not satisfied that is enough to lead a prudent sensible commercial person to properly infer a danger of default.

[48] Freezing orders are not designed as a tool to enable a claimant to secure a fund against future success.17 Such orders

are an intrusion on the ability of the party whose assets have been frozen to freely deal with their property. Here the Court is asked to draw significant adverse inferences from very limited evidence, and to use those inferences as a basis for making orders of significant consequence. Compromising, even temporarily, the respondents' property rights requires more than a suspicion that the business may have been sold or otherwise disposed of to defeat a future judgment.

[49] Having reached this conclusion, it is not necessary to consider the balance of convenience and the overall interests of justice.

Outcome

[50] The without notice application for freezing orders and ancillary orders is dismissed.

K G Smith Judge

Judgment signed at 3.35 pm on 8 March 2022

17 *Shen v An Ying Group Ltd (No 3)* [2006] NZHC 999; (2006) 3 NZCCLR 351 (HC) at [77].
